2. Gravity

a. Likelihood

The Secretary asserts that the injury is reasonably likely. If the hazard—inability to see obstacles while traveling through standing water—occurred, it is reasonably likely to result in tripping and falling. I affirm the assessed likelihood.

b. Severity

The Secretary provided credible testimony that tripping over an obscured obstacle would result in a sprain, broken bone, or head injury. I find that such an injury would reasonably result in a miner missing at least a full day of work. I affirm the assessed severity.

c. Number of Persons Affected

The inspector assessed that only one miner would be affected by the hazard. I find this reasonable because only examiners and inspectors travel the bleeder systems. Further, while examiners usually do this in pairs, it is likely that one would see the other fall and avoid the hazard. I affirm the assessed number of persons affected.

3. S&S

I affirm the S&S designation for the following reasons.

a. Step 1: The violation has been established.

The failure to keep a bleeder clear of standing water that obscures fall hazards is sufficient to constitute an underlying violation of a mandatory safety standard for the purposes of *Mathies* Step 1. *See supra* Section IV.B.1.

The Commission has affirmed a judge's S&S finding against this operator in sufficiently similar circumstances. *See Consol Pa. Coal Co.*, 39 FMSHRC at 1901. The facts in that case are almost identical to those here. In that case, the same inspector cited Consol for a violation of section 75.370(a)(1) because water was taller than his 18-inch boot, extended over a large area, was discolored, and contained tripping hazards. *Id.* at 1897. I find that the remaining *Mathies* factors were also established by a preponderance of the evidence.

b. Step 2: The violation was reasonably likely to result in the discrete safety hazard against which the regulation is directed—inability to travel safely because of obscured obstacles.

Unsafe travel is the discrete safety hazard against which the Plan's violated provision intended to protect. I find the inspector's description of the depth and color of the water credible. Even accepting Mr. Houchins' statement that a lot of clear water existed, that fact could not negate the presence, in other locations, of deep and "dark, orange, murky, standing water" as cited.

Further, the description mirrors the violative conditions already held to be sufficient for Step 2. In the previous similar Consol case, the Commission accepted the inspector's explanation that there were uneven floors and debris, that some water was so murky that a miner could not see his feet, and that it was reasonably likely that a miner would trip and fall walking through that hazard. *Consol Pa. Coal Co.*, 39 FMSHRC at 1899.

The Commission also expressly found that "[t]he requirement of a safe travelway is inextricably intertwined with the ventilation plan requirements of section 75.370." *Id.* at 1900 (acknowledging that examiners are required to travel bleeders). This negates a defense that miners do not work in the area, because examiners are required to walk the bleeders in the course of their work, and it is the operator's duty to ensure that they may travel there safely.

It is reasonably likely that a miner working in the area would not be able to see obstacles while traveling through the violative bleeders. Logic dictates that a person might reasonably trip over such an obstacle or unknown terrain and fall, or that the miner might step on or into an unseen obstacle, leading to a foot or leg injury. This possibility is sufficient to meet the requirement for Step 2. Therefore, the violation—failure to maintain bleeders free of standing water—is reasonably likely to result in the discrete safety hazard against which the regulation is directed.

c. Step 3: It is reasonably likely that inability to see obstacles in the standing water would result in an injury.

At this stage, the hazard caused by the inability to see obstacles in standing water has been established. For the reasons below, I find that the evidence establishes a trip, stumble, or fall due to obscured obstacles is reasonably likely to result in an injury.

Based on similar facts, the Commission has credited competent testimony that a miner who trips and falls is, "at a minimum, reasonably likely to suffer reasonably serious injuries such as broken bones." *Consol Pa. Coal Co.*, 39 FMSHRC at 1900. It is sufficient here that the inspector credibly testified that individuals could trip over many hidden obstacles in the murky, standing water, resulting in sprains, broken bones, or concussions. This testimony was bolstered by the fact that Mr. Verbosky acknowledged that there were places at which he could not see beneath the water's surface and would not be able to see obstacles.

I reject Respondent's assertions to the contrary. First, the operator contends that water in the bleeders never impeded or affected the ventilation. Resp't Br. at 34. This is irrelevant to the particular provision of the Plan that requires removal of standing water to permit safe travel.

Second, the operator argues that examiners are trained to walk through water in a bleeder cautiously. *Id.* at 34–35. Mr. Baker and Mr. Houchins testified to the caution employed in traveling the bleeders to take ventilation readings and facilitate water removal. This testimony is irrelevant, however, because the Commission has stated that miner precaution is not a defense in a Step 3 analysis. *See Consol Pa. Coal Co.*, 39 FMSHRC at 1900–01 (quoting *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992)) ("[T]he exercise of caution is not an element in determining the likelihood of injury once the reasonable likelihood of the occurrence of the

hazard is established, because '[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe working conditions.'").

d. Step 4: It is reasonably likely that such an injury would be of a reasonably serious nature—broken bones, sprains, or concussions.

An inspector's assessment of an injury as reasonably serious has generally been accepted. *See supra* Section III.B.3.d. Here, the Secretary has provided credible testimony that falling over obscured obstacles in standing water can result in strains, sprains, concussions, contusions, broken bones, and even death from drowning.

Respondent mostly addresses the *likelihood* of injury. *See* Resp't Br. at 34–36. Most relevant, Respondent contests the inspector's basis for his testimony that there are also hazards associated with the presence of contaminants that could cause cellulitis if the water contacted existing skin wounds. I need not address this, however, because it is sufficient for Step 4 that a trip, stumble, or fall over obstacles obscured by standing water would lead to the reasonably serious injuries cited by the inspector, and by the Commission and its judges in similar cases.

4. Negligence

I find that negligence was improperly assessed as "moderate." This is supported under a reasonable prudent person standard specific to mine operators. Respondent is familiar with the mining industry and relevant facts, and it has explicit familiarity with the protective purpose of this particular regulation. *See supra* Section IV.B.3.a. (noting that Respondent's similar violation has been affirmed as S&S by the Commission within the last five years). Therefore, I find that a reasonable prudent person in Respondent's position should have known about the violative condition.

The operator knew of the violative condition, but I find that the operator conducted every reasonably expected action to abate the standing water condition, even in the face of compounding problems. The Commission has affirmed a finding of no negligence where the Secretary failed to describe any actions not taken to meet the standard of care. *See JWR*, 36 FMSHRC at 1977. There, the Commission found no failure to act, noting that the inspector explained the citation was issued because "MSHA believed there was negligence and JWR 'did not do everything [it] could' to see that the contractor was following regulations." *Id.*

Here, the inspector acknowledged that Respondent implemented all means of removing water, noting that so long as all the equipment continued to run, those methods would have been sufficient. Tr. I at 274. He stated that the measures were clearly insufficient because everything should not have been failing at once. *Id.* at 238.

This is similar to *JWR* because no specific failed actions were described. As with the broad failure to "do everything [it] could," the Secretary here asserts that the failure of the measures taken equals negligence. I disagree.

While the presence of standing water existed for six weeks, the evidence demonstrates that considerable work was done to pump the water, that the number and severity of violative areas decreased over time, and that water was often pumped to acceptable levels before recurrence.

This was no small feat under the circumstances. Employees hand-carried replacement water pumps miles to remove water. Respondent installed more compressors when the existing were insufficient, and it built sumps to facilitate removal in steps. I find it noteworthy that Mr. Houchins, the assistant mine foreman, was personally involved in extraordinary efforts to correct the problem. *See* Tr. II at 146–54; Ex. R-6, CONSOL 022.

Numerous compounding problems also existed. Respondent dealt with constant wet conditions, broken pumps, and broken water pipes adding to the natural accumulation. It was reasonable to progressively address the problem as attempts proved inadequate, and there was no evidence that the operator was insufficiently focused on the problem. *See* Tr. I at 254–57; Tr. II at 101–06, 115–16, 135–37, 146; Ex. P-4, MSHA0037–40; Ex. R-5, 6; *see also* Resp't Br. at 38. Indeed, the inspector conceded that every corrective measure used to lower the water to acceptable levels had already been implemented by the operator before the inspection. *See* Tr. I at 200–01, 241–42, 274; *see also* Resp't Br. at 38.

The Secretary argues that grossly inadequate actions should not be considered mitigating circumstances. *See* S. Br. at 18; *Maple Creek Mining, Inc.*, 26 FMSHRC 539, 553 (June 2004) (ALJ), *aff'd in part & rev'd in part on other grounds*, 27 FMSHRC 555 (Aug. 2005). There, the judge affirmed the negligence finding because she found that the pumping conducted was "grossly inadequate." 26 FMSHRC at 553. The Commission affirmed her negligence finding, agreeing that the testimony indicated a "lack of seriousness" on the operator's part with respect to water accumulation in an escapeway. 27 FMSHRC at 566.

Accepting the Secretary's contention, I find that the record in this case does not support a lack of seriousness on Respondent's part. While previously inadequate, the measures employed made bleeder travel safe intermittently, and Respondent made continuous efforts, including the addition of a surface pump, before the inspection cited the violation. A senior mine manager was personally involved in these extensive efforts. The facts here are thus clearly distinguishable. For the above reasons, I reduce the negligence finding from "moderate" to "none."

5. Penalty

I have previously recognized the Secretary's proper consideration of the operator's business size and ability to continue in business. *See supra* Section III.B.5. These Section 110(i) considerations remain the same here.

Respondent's history of violations is reflected in Exhibit P-6. Its history consists of six repeat violations during the inspection period. Accordingly, this factor has already been properly considered and is of no consequence in my decision to modify this assessed penalty.

I affirm the violation's gravity as assessed. I found that injury is reasonably likely, is likely to result in lost workdays or restricted duty, is S&S, and would affect one person. Accordingly, this factor did not affect my decision to reduce the penalty.

Following the citation, Respondent pumped the accumulations of water down and made the area safe for travel within nine days. Considering this fact with its demonstrated continuous mitigation, I find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification.

The proposed penalty was based, in part, on the negligence assessed in the citation. Because I find that a reduction in negligence is warranted, *see supra* Section IV.B.4., I also find that a penalty reduction is appropriate. The proposed penalty was $674.00, based in part on the Secretary's finding of moderate negligence. Because I find that the operator was not negligent, I assess a penalty of $150.00.

C. Conclusion

I affirm the citation and gravity. I find a reduction in negligence from "moderate" to "none." I therefore assess a penalty of $150.00 in accordance with the modification.

V. CONCLUSION

It is **ORDERED** that Citation No. 9203910 be **AFFIRMED** as issued.

It is also **ORDERED** that Citation No. 9204098 be **AFFIRMED** with the assessed gravity, and that the level of negligence be **MODIFIED** from "moderate" to "none."

Finally, it is **ORDERED** that the Respondent pay the Secretary of Labor the assessed penalty of **$850.00** within 30 days of the date of this decision.[5]

Michael G. Young
Administrative Law Judge

[5] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

Applicant Details

First Name	**Emile**
Middle Initial	**J**
Last Name	**Katz**
Citizenship Status	**U. S. Citizen**
Email Address	**emilejkatz@gmail.com**
Address	**Address** Street **2000 2nd Ave. S, 402** City **Birmingham** State/Territory **Alabama** Zip **35233** Country **United States**
Contact Phone Number	**8479643246**

Applicant Education

BA/BS From	**Case Western Reserve University**
Date of BA/BS	**May 2015**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 14, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Journal of International Law** **California Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Illinois**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Gordon, Alexandra
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Chemerinsky, Erwin
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5106426483

References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue N.W.
Washington D.C. 20001

Dear Judge Bates,

Currently, I am a law clerk for Judge Kevin Newsom on the Court of Appeals for the Eleventh Circuit. I am writing to apply for the advertised 2022-2023 term clerkship position assisting you in carrying out your responsibilities as Chair of the Standing Committee.

The position particularly intrigues me because I hope to one day enter legal academia and write in the area of federal courts and procedure. I've long been interested in the Rules Enabling Act and the clerkship would be invaluable to understanding the rules process and help provide me with background for future research on procedural topics. Additionally, Judge Newsom has emphasized the value of his time working as part of the Advisory Committee on Rules of Appellate Procedure and it seems to me that being part of the Standing Committee process could likewise be valuable. I am also generally interested in clerking on a district court for the opportunity to learn more about trial court litigation.

Prior to my clerkship with Judge Newsom, I graduated from the University of California, Berkeley School of Law, where I served as an Associate Editor for the *California Law Review* and as a Senior Articles Editor for the *Berkeley Journal of International Law*. While attending law school, I published a student Note in the *California Law Review* about the judicial contempt power and wrote an article about judicial control over the United States Marshals that will be published in the *Pace Law Review* this year. Furthermore, as a law clerk for Judge Newsom, I have honed my legal research and writing skills while drafting numerous bench memoranda and opinions.

Before law school, I developed a strong work ethic (mostly from scrubbing pots) while serving as a paratrooper in the Israel Defense Forces—a trait that has served me well in my legal career so far.

Attached for your review are my resume, law school transcript, and a writing sample. Letters of recommendation from Berkeley Dean Erwin Chemerinsky, and Berkeley Professors Alexandra Gordon, and John Yoo have been submitted through OSCAR. I studied at Northwestern during my 1L year after which I transferred to Berkeley to live with my partner. I have attached transcripts from both Berkeley and Northwestern.

Thank you for considering my application. Please feel free to contact me if I can provide you with any additional information.

Sincerely,

Emile J. Katz

EMILE J. KATZ
2000 2nd Ave. S #402, Birmingham, Alabama 35233 • EmileJKatz@gmail.com • (847) 964-3246

EDUCATION

University of California, Berkeley School of Law, Berkeley, California
Juris Doctor, May 2021

- California Law Review, *Associate Editor*
- Berkeley Journal of International Law, *Senior Articles Editor*
- Research Assistant to Professor Orin Kerr and Professor Rebecca Goldstein
- Pro bono honors

Northwestern Pritzker School of Law, Chicago, Illinois
Candidate for Juris Doctor, August 2018-May 2019

- GPA 3.857, Dean's List

Case Western Reserve University, Cleveland, Ohio
Bachelor of Arts, History and Anthropology, *cum laude,* May 2015

EXPERIENCE

Judge Kevin C. Newsom, U.S. Court of Appeals, Eleventh Circuit, Birmingham, Alabama
Law Clerk, August 2021-August 2022

- Researched law, wrote bench memoranda, and drafted judicial opinions on a range of topics including constitutional claims, federal statutory claims, and state law claims.
- Edited and cite-checked other clerks' work

Arnold & Porter Kaye Scholer, Chicago, Illinois & Washington, D.C.
Summer Associate, June 2020-July 2020

- Drafted complaint for declaratory judgment and contract reformation
- Researched and drafted memo on procedural due process claim for appellate brief

Judge Susan J. Dlott, U.S. District Court, Southern District of Ohio, Cincinnati, Ohio
Extern, May 2019-July 2019

- Researched and wrote memoranda on state and federal case law regarding civil and criminal issues, such as labor law violations and sentencing guideline variances

Immigrant and Refugee Law Center, Cincinnati, Ohio
Legal Intern, May 2018-August 2018

- Researched and drafted memorandum about refugee seeking asylum from gang related violence

Israel Defense Forces, Israel
Paratrooper/Sniper, November 2015-December 2017

- Led small team during operations furthering area security goals
- Instructed new snipers and commanders

BAR MEMBERSHIP

- Illinois

PUBLICATIONS

- Note, *The "Judicial Power" and Contempt of Court: A Historical Analysis of the Contempt Power As Understood by the Founders*, 109 Cal. L. Rev. 1913 (2021)
- *Information Security in the Courts*, 126 Penn St. L. Rev. Penn Statim 26 (2021)
- *Grand Unified (Separation of Powers) Theory: Examining the U.S. Marshals*, 42 Pace L. Rev. __ (2022) (publication forthcoming)

ADDITIONAL INFORMATION

Languages: Hebrew (fluent)
Interests: Backpacking, reading novels, running, traveling, and cooking

Emile Katz
Northwestern University School of Law
Cumulative GPA: 3.857

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Communication & Legal Reasoning	Grace Dodier	B+	2	
Civil Procedure	Richard Hoskins	B+	3	
Contracts	Emily Kadens	A	3	
Torts	Marshall Shapo	A+	3	
Criminal Law	Deborah Turkheimer	A-	3	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Property	Peter DiCola	A-	3	
Communication & Legal Reasoning	Grace Dodier	A-	2	
Contracts II: Complex Commercial Contracs	Emily Kadens	A+	3	
Estates and Trusts	Max Schanzenbach	A-	3	
Constitutional Law	Martin Redish	A+	3	

Grading System Description
All course work at Northwestern University School of Law is graded on a 4.33 grading scale. The authorized letter grades and their assigned numerical values are: A+ = 4.33, A= 4.00, A- = 3.67, B+=3.33, B=3.00. B-=2.67, C+=2.33, C=2.00, D=1.00. Mandatory Curve Policy

First-Year Courses:
In first-year required doctrinal courses, the mean will be 3.35, with a permitted range of 3.3 - 3.4.
Faculty are also required to adhere to a mandatory distribution of no more than 5% A+ grades (rounded up) and at least 10% B- and below grades (rounded down).
In Communication and Legal Reasoning (CLR) the mean will be 3.45, with a permitted range of 3.4 - 3.5.
Upper-level doctrinal courses, including 1L Electives:
In all upper-level doctrinal courses with enrollments of 13 or larger, the mean will be a 3.55, with a permitted range of 3.5 - 3.6. A doctrinal course is a lecture course in which the grade is primarily based on an exam.

Berkeley Law
University of California
Office of the Registrar

Emile Katz
Student ID: 3035415283
Admit Term: 2019 Fall

Academic Program History
Major: Law (JD)

2019 Fall

Course		Description	Units	Law Units	Grade
LAW	231	Crim Procedure-Investigations Erwin Chemerinsky	4.0	4.0	HH
LAW	241	Evidence Sean Farhang	4.0	4.0	H
LAW	243	Appellate Advocacy **Fulfills Writing Requirement** Alexandra Robert-Gordon	3.0	3.0	H
LAW	250	Business Associations Stavros Gkantinis	4.0	4.0	P

Transfer Credits	Units	Law Units
Northwestern Unv School of Law	26.0	26.0
Fulfills Constitutional Law Requirement		
Northwestern Unv School of Law.	2.0	2.0
Units Count Toward Experiential Requirement		

	Units	Law Units
Term Totals	43.0	43.0
Cumulative Totals	43.0	43.0

2020 Spring

Course		Description	Units	Law Units	Grade
LAW	211.2	Prac Ethics: Simula Approach **Fulfills Professional Responsibility Requirement** Bruce Budner	2.0	2.0	CR
LAW	220.1	Constitution in Early Republic **Fulfills 1 of 2 Writing Requirements** John Yoo	2.0	2.0	CR
LAW	222	Federal Courts Amanda Tyler	5.0	5.0	CR
LAW	225	Legislation & Statutory Interp Jonathan Gould	3.0	3.0	CR
LAW	244.1	Adv Civ Pro:Complex Civil Lit Andrew Bradt	3.0	3.0	CR

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	58.0	58.0

* **Due to COVID-19, law school classes were graded credit/no pass in spring 2020.**

2020 Fall

Course		Description	Units	Law Units	Grade
LAW	245	Negotiations **Units Count Toward Experiential Requirement** Jonathan Lee Esther Kim	3.0	3.0	H
LAW	252.2	Antitrust Law Prasad Krishnamurthy	4.0	4.0	P
LAW	285.2D	Deth Penlt Cl Sem I Ty Alper Elisabeth Semel	2.0	2.0	CR
LAW	295.5D	Death Penalty Clinic **Units Count Toward Experiential Requirement** Ty Alper Elisabeth Semel Mridula Raman	4.0	4.0	CR
LAW	299	Indiv Res Project John Yoo	2.0	2.0	HH

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	73.0	73.0

Carol Rachwald, Registrar

Berkeley Law
University of California
Office of the Registrar

Emile Katz
Student ID: 3035415283
Admit Term: 2019 Fall

Printed: 2021-06-10 13:33

2021 Spring

Course		Description	Units	Law Units	Grade
LAW	220.9	First Amendment Kenneth Bamberger	3.0	3.0	HH
LAW	223	Administrative Law Jonathan Gould	4.0	4.0	H
LAW	278.78	Computer Crime Law Orin Kerr	3.0	3.0	H
LAW	299	Indiv Res Project Jonathan Gould	2.0	2.0	HH

	Units	Law Units
Term Totals	12.0	12.0
Cumulative Totals	85.0	85.0

Carol Rachwald, Registrar

University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

May 24, 2020

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I write in support of Emile Katz's application to serve as a clerk in your chambers. Emile was a student in my Appellate Advocacy class in the fall of 2019 and he earned an Honors grade.

I am very familiar with Emile's writing and research skills because I reviewed multiple drafts of his work. Further, because Emile was a very engaged student and frequently came to office hours to discuss various aspects of his brief with me, I am aware of what an interesting thinker he is and what a delight he is to be around. Having served as a law clerk in District Court, a Staff Attorney at the Ninth Circuit, and now as a Superior Court judge, I know what it takes to excel in chambers.

In Appellate Advocacy, students brief and argue a case currently pending in the California Supreme Court, following the rules of court as closely as the classroom experience allows. By reputation, this is one of the hardest classes at Berkeley Law and thus tends to attract students, like Emile, who enjoy a challenge and hard work. Students have about two weeks to research the law and absorb the record, and they must do this while learning how to write a persuasive, full-length appellate brief.

Emile briefed and argued People v. Lopez, which addressed the question of whether pursuant to Arizona v. Gant, 556 U.S. 332 (2009), which limited the exception for warrantless searches incident to arrest, a police officer can search the interior of a suspect's vehicle for identification if the suspect fails to provide it upon request. Since 2002, under People v. Arturo D., 27 Cal.4th 60 (2002), the law in California had been that officers could conduct a limited search for identification when a driver refuses to provide it. In Lopez, the trial court held that Arturo D. was no longer good law, Gant controlled this case, and the search of Ms. Lopez was invalid. The court of appeals reversed and held that Gant did not displace the Arturo D. identification exception and that the search for identification was constitutional.

The case turned out to be particularly challenging as the numerous legal issues fell solidly into the cracks of existing jurisprudence and there was no clear answer. It was also difficult, and took three instructors several weeks, to find a workable and complete argument structure. Emile handled the significant burden with maturity. The class involves a lot of editing and feedback, which can be trying for some students. Emile was receptive to and made good use of the comments and edits he received. He was not afraid to take risks and think expansively, but he was also able to judge which arguments did not work and set them aside.

Emile showed up to every class prepared and often emailed or came to office hours with incisive and challenging questions. I have seen great and steady improvement in his writing and appreciate that he continues to challenge himself to be better and better. By the end of the semester, through careful editing and rethinking, Emile produced a strong and well-supported brief. His oral argument was also well founded and well delivered.
Particularly impressive is that Emile did so well in a very difficult class while acclimating to a new law school, taking a number of challenging classes, participating in the Jewish Students Association, and serving as an editor on the Berkeley Journal of International Law.

Before attending law school, Emile spent two years serving in the Israeli Army. I have known a number of Americans in Emile's position of having Israeli citizenship through one parent, and each has avoided serving. Emile volunteered. The Israeli Army is a notoriously demanding and sometimes dangerous experience and it seems to have taught Emile a rare discipline, organization, and an ability to meet every test with grace.

Emile is a remarkably kind and generous person. He tended to stick around after a three-hour, evening class and chat about his work until I got into an Uber to go home. I attributed this to his being a highly motivated and interested student. He is, but this was only part of the story. One night, I had meetings with students after class for about 45 minutes and Emile returned when they were done. I asked if he needed help with his brief and he informed me that he had come back so I would not be standing in the dark, waiting for a car by myself late at night. Emile is a true mensch. I very much enjoyed teaching and getting to know him.

Emile was an absolute pleasure to have in class and he would be a wonderful addition to any chambers. He is a talented student and a delightful person. You, your staff, and the other clerks will enjoy him greatly.

I unreservedly recommend Emile. If you have any questions or I can be of further help, please do not hesitate to call me.

Sincerely,

Alexandra Robert Gordon

Alexandra Gordon - alexandra.rg@berkeley.edu

February 08, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing to recommend Emile Katz for a clerkship in your chambers. He is an engaging, thoughtful, and mature young man who has done everything from serve as a sniper in the Israel Defense Force to write on the original understanding of the inherent Article III contempt power.

Mr. Katz was a student in my Spring 2020 seminar on the Constitution in the Early Republic. The class teaches students how to conduct a rigorous examination of the original understanding of a constitutional provision. We begin by discussing the methodological debates over constitutional interpretation, and then follow by reading some of the classic authors of the Founding period, such as Bernard Bailyn and Gordon Wood. The class concludes by examining some of the central problems that confronted the framers and their responses. Students read a wide range of materials including the records of the Philadelphia Convention and the state ratification debates as well as leading examples of originalist scholarship and judicial opinions.

Throughout the semester, Mr. Katz was heavily involved in class discussion. He enjoyed challenging other points, always responding to others' viewpoints in a substantive and collegial manner. I was disappointed that the Spring 2020 semester was pass/fail; I am certain that his paper would have received one of the best grades in the class. He asked whether the inherent judicial power to sanction, identified by the Supreme Court in cases such as Willy v. Coastal Corp., is consistent with the original understanding of Article III. I thought it the best piece I have read so far on the question, and it showed a deep understanding of the fundamental questions concerning the power of the federal courts and the reach of congressional regulation over their establishment.

Mr. Katz did extremely well at Northwestern Law, transferred here, and then continued to perform at a very high level. But what is most impressive about Mr. Katz is his commitment to public service. In my conversations with him, I have learned that he intends to use his law degree to serve society as a prosecutor, government official, or some other form of public service. As you can see from his resume, Mr. Katz volunteered for Israel Defense Forces and became a sniper and paratrooper. I think this has given him a maturity and seriousness that sets him apart. Everything Mr. Katz has done thus far in his legal training has been tailored toward becoming a skilled legal practitioner in service to the community.

Between his intellect, his experience, and his admirable career aspirations, Mr. Katz would make an outstanding clerk. I would be glad to answer any additional questions. Please feel free to reach me via phone at (510) 600.3217 or by email at yooj@berkeley.edu.

Best wishes,

/s/

John Yoo
Emanuel S. Heller Professor of Law
University of California, Berkeley, School of Law

February 08, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing to highly recommend Emile Katz for a judicial clerkship for the 2022-23 year. Mr. Katz will be clerking for Judge Kevin Newsom on the United States Court of Appeals for the Eleventh Circuit in 2021-22. Mr. Katz was a student in my Criminal Procedure: Investigations class in Fall 2019. He received a High Honors grade in the class and wrote one of the best exams in a class of 196 students. I have had many conversations with him and always have been very impressed.

Mr. Katz was a frequent participant in class discussions notwithstanding the size of the class. Also, he sat in the front row and we often spoke before class began. It was clear that he always was thoughly prepared for class and always had thought carefully about the material. His comments during class discussion, like his exam, reflected exceptional analytical abilities and the ability to express himself articulately and concisely. I especially was impressed by the thoughtfulness and originality of his comments and questions.

Mr. Katz came to law school after service in the Israeli military. I think this experience is reflected in a seriousness of purpose and a maturity that is exceptional. I would feel comfortable entrusting him with the most difficult and sensitive matters and know that he would handle them in a thorough and professional manner.

I have no doubt that Mr. Katz will be an excellent law clerk and attorney. He is very smart, hard working, and conscientious. He also is a wonderfully kind person. I know you would very much enjoy working with him.

Sincerely,

s/
Erwin Chemerinsky

Erwin Chemerinsky - echemerinsky@law.berkeley.edu - 5106426483

Writing Sample

This is an excerpt from a brief written for an appellate advocacy class. The brief is based on the record of *People v. Lopez*, 453 P.3d 150 (Cal. 2019). The full brief is available upon request. The research, analysis, and writing are my own, including revisions based on comments provided by my professor.

ARGUMENT

II. THE SEARCHES OF MS. LOPEZ'S VEHICLE AND PURSE WERE UNREASONABLE AND UNCONSTITUTIONAL

A. The Searches Of Ms. Lopez's Vehicle And Purse Were Invalid Because No Specific Exception To The Warrant Requirement Applies.

The Fourth Amendment grants the people the right to "be secure in their persons...and effects against unreasonable searches and seizures." U.S. Const. Amend. IV. Thus, a search violates the Fourth Amendment if it is unreasonable. Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967): *see also Riley v. California*, 573 U.S. 373, 381-82 (2014) ("[I]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement."). Moreover, the exceptions to the warrant requirement are specific, well delineated, and should be construed narrowly. *See Jones v. United States*, 357 U.S. 493, 499 (1958) ("exceptions to...warrant have been jealously and carefully drawn"). Therefore, the Court should be wary of creating new exceptions.

Neither Officer Moe nor Officer Barrera had a warrant at the time they detained Ms. Lopez, went into Ms. Lopez's car, grabbed her purse, and searched through it. Thus, the only way that the search of Ms. Lopez's purse could be considered reasonable, and therefore constitutional, is if there was an established exception to the warrant requirement that authorized the officers' search. There was not. The only exception that could arguably apply to this case is the search incident to arrest exception, but after

Arizona v. Gant even that exception does not authorize the search. Other exceptions to the warrant requirement are also based on officer safety or evidentiary concerns, *Arizona v. Gant*, 556 U.S. 332, 346 (2009), but neither of those concerns is present here. Therefore, none of the established exceptions to the warrant requirement apply in this case. Because the exceptions to the warrant requirement are narrow, the Court should not create a new one and should hold the search of Ms. Lopez unconstitutional.

B. Under *Arizona v. Gant*, The Search Of Ms. Lopez Is Unconstitutional.

Based on the U.S. Supreme Court's holding in *Gant*, the searches of Ms. Lopez's vehicle and purse violated the Fourth Amendment. *Gant* clarifies when police may conduct a warrantless search incident to arrest, and the police in this case were prohibited from conducting a search. Prior to *Gant*, the controlling case law for searches incident to arrest in the vehicle context was *New York v. Belton*. *Belton* had been construed by lower courts to allow law enforcement to search the interior of a vehicle any time they made an arrest. *Id.* at 342. The *Gant* court rejected a broad reading of *Belton* and explained that searches incident to arrest are only justified "when safety or evidentiary concerns demand." *Id.* at 346. In the traffic offense context, the Court stated that, "[a] rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals." *Id.* at 345. The Supreme Court was particularly disturbed that a

broad reading of *Belton* authorized the police to search within "every purse, briefcase, or other container" within the arrestee's vehicle. *Id*.

Gant held that a search incident to arrest is permissible only when the area searched is within the reach of the defendant or evidence of the crime of arrest is likely to be found in the area. *Id.* at 351. In *Gant*, the defendant was arrested for driving with a suspended license and placed in the back of a police car. *Id.* at 335. After the police arrested the defendant, they searched his vehicle and found cocaine in the pocket of his jacket on one of the car seats. *Id.* The defendant was not within reach of his vehicle and could not pull out a weapon endangering officer safety or destroy evidence within the vehicle. *Id.* The Court also found it unlikely that evidence of the crime of arrest would be found within the defendant's vehicle because the defendant was arrested for a traffic violation. *Id.* at 343. Thus, because no exceptions to the warrant requirement exists absent danger to officer safety or risk that evidence will be destroyed, the Court held the search unconstitutional. *Id.* at 339, 351. The search of Ms. Lopez's belongings was similar to the search in *Gant*. Because there was no possibility that Ms. Lopez could reach into her vehicle, "both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.* at 339; *see also People v. Evans*, 200 Cal. App. 4th 735, 745 (2011) (search impermissible when arrestee outside of vehicle and under police control).

1. Ms. Lopez was arrested, and the police searched beyond the permissible scope for searches incident to arrest.

Because Ms. Lopez was arrested, the police were limited in their constitutional ability to search her car and purse. When a suspect is arrested, searches of the suspect are limited by the scope of the search-incident-to arrest exception as articulated in *Gant*. We know Ms. Lopez was under arrest because she was both restrained and submitted to police assertion of authority. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *California v. Hodari D.*, 499 U.S. 621, 626 (1991). In *Mendenhall*, the U.S. Supreme Court held that the defendant was not seized under the Fourth Amendment when she was asked by the police to voluntarily accompany them to a private room in the airport and the police did not threaten her or make a show of force. *Mendenhall*, 446 U.S. at 545. The Court held that as long as an objectively reasonable defendant would feel free to walk away, they are not seized. *Id.* at 554. In *Hodari D*, the Court held that a fleeing suspect was not arrested until he was tackled by a police officer because an arrest only occurs when police use physical force or the suspect submits to police authority. 499 U.S. at 626.

Unlike *Mendenhall*, where the defendant could simply walk away, Ms. Lopez was not free to simply walk away. Ms. Lopez attempted to walk away from Officer Moe and tried to pull away when he restrained her but was not allowed to leave. (RT 37-38) Furthermore, unlike the fleeing defendant in *Hodari D.*, Ms. Lopez was placed in a control hold and handcuffed by Officer Moe. (RT 34). In fact, Officer Moe continued to hold Ms. Lopez at the back of her car while Officer Barrera searched it. (RT 39). Ms. Lopez was physically restrained and a reasonable person in view of all the circumstances

would not have felt free to leave. *Hodari D.*, 499 U.S. at 628. Therefore, Ms. Lopez was arrested, and the police exceeded their authority to search her.

2. The search of Ms. Lopez's vehicle was impermissible because the interior of her vehicle was out of her reach.

The search of Ms. Lopez violated her Fourth Amendment right to be free from unreasonable searches because she was not within reaching distance of the interior of her vehicle. *Gant,* 556 U.S. at 343. Officer Moe thus searched beyond the scope of what the search incident to arrest exception allows. As stated above, the limitations on the scope of a search incident to arrest are based on the underlying purposes of protecting officers and safeguarding evidence of the offense of arrest. *Id.* at 339 (referencing the rationales in *Chimel v. California*, 395 U.S. 752 (1969)). Applying *Gant*, the California Court of Appeal in *Evans* held that when an arrestee was "detained" on the ground outside of his vehicle, he "did not have access to the car's interior." 200 Cal. App. 4th at 745. *Evans*, therefore, held that the search was impermissible under *Gant*. *Id.* at 756.

Like the defendants in *Gant* and *Evans,* Ms. Lopez could not reach the interior of her vehicle and so could not retrieve any weapon from it. Officer safety interests were thus not advanced by searching the vehicle. Additionally, Ms. Lopez was held at the back of her vehicle in handcuffs at the time of the search and was incapable of endangering anyone. Indeed, Ms. Lopez was alone and facing three police officers who were presumably armed. (RT 8). It is also likely that Ms. Lopez, who is 5'4", was physically smaller than the officers. (CT 1). Hence, even were Ms. Lopez not handcuffed, the danger to officer safety would still be insufficient to justify the search. Relatedly, because

Ms. Lopez was restrained and handcuffed by Officer Moe outside of her car, there was no way she could reach into the vehicle and destroy evidence inside of it.

3. The search of Ms. Lopez's vehicle was impermissible because there is no credible argument that there was any evidence for the officers to find.

The search of Ms. Lopez violated her Fourth Amendment right to be free from unreasonable searches because it was not "reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Gant*, 556 U.S. at 335; *see also Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment). Where, as here, a suspect may have committed a traffic offense, police cannot reasonably expect to find evidence of the crime of arrest within the arrestee's vehicle. *Gant*, 556 U.S. at 343-44; *see also Evans*, 200 Cal. App. 4th at 750 ("*Gant* teaches that 'traffic violation[s]' do not provide a reasonable basis to search [for evidence]"). Like the defendant in *Gant*, 556 U.S. at 344, Ms. Lopez was initially arrested for a traffic violation, rather than a crime such as a drug offense for which physical evidence can be found. *Id.*; (RT 34.)

Just as the U.S. Supreme Court found that the police could not expect to find any evidence of Gant's crime within his vehicle, Officer Moe could not reasonably expect to find evidence of Ms. Lopez's crime within her vehicle. It would be impossible for Officer Moe to find physical evidence that Ms. Lopez drove without a license because driving without a license requires that she not have a license. Hence, searching for evidence of that crime implies searching for the nonexistence of an object (i.e. her license). Once Ms. Lopez said she did not have a license, the police had all the evidence they needed in order to arrest her. Additionally, just as a California Court of Appeal prohibited a search when

the defendant in *Evans* was arrested for a traffic offense, this Court should apply *Gant* and hold that the search of Ms. Lopez was unconstitutional when the only offense that Officer Moe knew about was a traffic offense. There was no valid reason for the police to search within her vehicle and thus the search was impermissible under the search incident to arrest exception.

C. Even If *Gant* Does Not Control, The Search Of Ms. Lopez's Vehicle Violates *Knowles* And *Macabeo.*

Even if the U.S. Supreme Court's holding in *Gant* does not control, the search of Ms. Lopez's vehicle is illegal under *Knowles v. Iowa* and this Court's holding in *People v. Macabeo*. That is, if Ms. Lopez was not arrested, the safety and evidentiary rationales that underlie the search incident to arrest exception are absent and cannot justify the search. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

In *Macabeo*, this Court stated that "it is the fact of the arrest that justifies the search" and consequently, where the defendant is not arrested there is no justification for the search. *People v. Macabeo*, 1 Cal.5th at 1214. Furthermore, citizens have greater reasonable expectations of privacy before they are arrested than after. *Maryland v. King*, 569 U.S. 435, 463 (2013) ("reduced expectation of privacy" post-arrest). Therefore, if Ms. Lopez was not arrested the search was even less reasonable.

In *Knowles*, the U.S. Supreme Court held that the search of the defendant's vehicle after the defendant was given a citation for a traffic violation was unconstitutional. 525 U.S. at 114. The Court reasoned that the officers did not have a warrant and the policy rationales for a search incident to arrest (i.e. officer safety and preservation of evidence)

were absent or minimal in the case of a citation. *Id.* at 117. The Court recognized that in cases of citations the threat to officer safety is less than during a custodial arrest. *Id.* Thus, the Court held that "the concern for officer safety in this context may justify the 'minimal' additional intrusion of ordering a driver and passengers out of the car, [but] does not by itself justify the often considerably greater intrusion attending a full field-type search." *Id.* The high court also noted that officers have other methods, aside from searching the vehicle, to ensure their safety. *Id.* at 117-18. Moreover, the Court noted that because the infraction was a traffic violation there would not be evidence of the violation in the vehicle. *Id.* at 118. Therefore, the justification of evidence preservation is inapplicable to this case.

In *Macabeo*, this Court held that a defendant's failure to stop at a stop sign was "analogous to *Knowles*" because the defendant was not arrested and thus, there was no justification to search him. *Macabeo*, 1 Cal.5th at 1219. After pulling over the defendant, the police searched his phone and subsequently arrested him. *Id.* at 1212. The defendant moved to suppress evidence of a separate crime that the police found on his phone. *Id.* The trial court denied the motion based on the argument that the defendant could have been arrested, and this Court reversed. *Id.* This Court relied on the U.S. Supreme Court's holding in *Knowles* and stated that if a defendant is not arrested, the underlying justifications for a search incident to arrest (i.e. officer safety and evidence preservation) do not exist and the search was therefore invalid. *Id.* at 1219.

Just as in *Knowles* and *Macabeo*, Ms. Lopez was stopped for a traffic violation, so the risk to officer safety was too minimal to justify the search of her vehicle. Just as the

court observed in *Knowles*, 525 U.S. at 117, that officers have other ways of ensuring their safety, the officers who searched Ms. Lopez had other ways of protecting themselves as well. Specifically, if the officer had reasonable suspicion to believe Ms. Lopez was armed and dangerous, they could have conducted a *Terry* "patdown" to check for weapons. *Id.* at 118; *see also Terry v. Ohio*, 392 U.S. 1, 30 (1968). Officers can also order suspects to get out of their vehicles. *Knowles*, 525 U.S. at 117-18. Because Ms. Lopez was already outside of her car when she was approached by Officer Moe, the risk to officer safety was minimal.

Also, like the defendant in *Knowles*, the police could not reasonably expect to find evidence of Ms. Lopez's traffic violation (i.e. driving without a license) within her vehicle. *Id.* at 118. Like the defendant in *Knowles*, to whom the police had already given a citation, the officers in this case already had all the evidence they needed to write a citation and had no need to search the interior of Ms. Lopez's vehicle. *Id.*; *see also Macabeo*, 1 Cal. 5th at 1206. It does not matter that Ms. Lopez had not yet been cited because in *Macabeo* this Court held the search of the defendant was unreasonable even though the police never issued a citation. 1 Cal. 5th at 1224. Therefore, the search of Ms. Lopez was unconstitutional.

D. The Court of Appeal Erred In Applying *Arturo D.* Because It Has Been Overruled by *Gant*.

The Court of Appeal erred in relying on *Arturo D.* because the U.S. Supreme Court's decision in *Gant* overruled it. After *Gant*, if anything remains of *Arturo D.*, it is only that police may search for a defendant's identification when there is risk to officer

safety or there is the possibility that evidence can be found in the vehicle. *In re Arturo D.*, 27 Cal. 4th 60, 79 (2002); *but see Gant*, 556 U.S. at 335; *Knowles*, 525 U.S. at 118; *Macabeo*, 1 Cal. 5th at 1224.

In *Arturo D.*, the Court held that a limited search of a vehicle for registration or identifying information was reasonable under the Fourth Amendment. The Court stated, "[a]bsent contrary direction from the high court...longstanding authority...permit[s] a police officer to conduct...a limited warrantless search of a vehicle for required regulatory documentation." *In re Arturo D.*, 27 Cal. 4th at 75-76. The *Arturo D.* Court based its holding on the governmental interest in finding a suspect's documentation prior to citation. *See Id.* at 83-86. *Arturo D.* recognized that suspects have a decreased expectation of privacy in their vehicles and favored the government's interest in finding identifying documents.

However, since that decision, *Gant* has clarified police officers' ability to search absent a warrant when they stop a suspect for a traffic violation. The *Gant* Court found that in such a context, the privacy interests of the suspect deserved greater weight than the government interest in performing a search. 556 U.S. at 344-45. The Court rejected a rule allowing police to search "every purse, briefcase, or other container" whenever they stop someone for a traffic offense. *Id.* The *Gant* Court specified exactly when police may conduct a search in the traffic offense context and provided no carve-outs for the types of searches authorized by *Arturo D.* Because *Gant*'s holding is incompatible with *Arturo D.*, *Arturo D.* is no longer good law, and the Court of Appeal erred in applying it.

The "Judicial Power" and Contempt of Court: A Historical Analysis of the Contempt Power as Understood by the Founders

Emile J. Katz*

This Note focuses on the power of the federal judiciary to hold litigants in contempt of court. In particular, this Note analyzes whether the contempt power of the federal judiciary stems from an inherent grant of power in the Constitution or whether it is derived purely from acts of Congress. The extent to which Congress can limit judges' power to punish contempt depends on whether judges have an inherent power to punish contempt. Because judges have used the power to punish in ways that abridge individual liberties and civil rights, it is imperative that Congress be aware of whether it can constitutionally limit judicial conduct vis-a-vis contempt. Part I of this Note outlines what judges and scholars have written about an inherent judicial contempt power. Part II of this Note explores whether the drafters and ratifiers of the Constitution intended to vest the judiciary with an inherent contempt power. In doing so, this Note examines the most important sources from the Founding Era. Those sources include texts from pre-revolutionary British legal practice, American colonial practice, revolutionary state practice, the ratification debates, and the actions of the Founders immediately following the ratification of the Constitution. By tracing the history of the contempt power from British practice all the way to constitutional ratification, this Note provides a comprehensive overview of how the thoughts of the framers changed over time and what the framers finally intended with regard to contempt when they drafted the Constitution. This Note argues that the framers did not intend to create an inherent judicial contempt power and that judges' contempt power is therefore under Congress's control.

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INTRODUCTION

This Note explores the limits of the judicial power to punish contempts. Federal courts in the United States wield a great deal of power to ensure that the law is followed and that courts are respected. When parties refuse to comply with court orders and disrespect the judicial process, courts have used punishment and

Shams Hirji, Alan Spellberg, and Lila Englander all of whom provided critical advice and feedback without which this Note would not have been written or published. Finally, I am indebted to Howard and Marlene Kaplan who helped me discover and pursue my passion for studying the law.

the threat of punishment to compel parties to follow their commands. This is the contempt power.

Article III of the Constitution grants power to the federal courts by providing that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[1] Although Article III clearly vests the judicial power in federal judges, there has been debate regarding the exact authority the Founders meant to include by using the words "judicial Power." Some courts and scholars have interpreted the phrase "judicial Power" to encompass a form of the common law power to punish for contempts of court.[2] Others have questioned whether the contempt power was intended to be inherent to the judiciary at all.[3]

Courts and scholars that interpret the "judicial Power" as including some form of common law power base their findings both on normative ideas of judicial necessity and on the history of the contempt power.[4] Accordingly, judges throughout the country's history have used their supposed inherent power to punish contempts and compel individuals to comply with court orders.[5] Courts have also used the power to punish when litigants challenge the dignity of the courts,[6] regardless of whether court orders have been disobeyed.[7]

In sum, courts have broad discretion in determining what conduct they consider to be contempt of court.[8] And when punishing parties held to be in contempt, courts have used their authority to detain or fine those parties.[9]

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1. U.S. CONST. art. III, § 1.

2. *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874) ("The power to punish for contempts is inherent in all courts . . . ."); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911) ("[T]he power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law."); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 741–42 (2001) (stating that the power to sanction is an "implied indispensable power" of courts under Article III).

3. *See, e.g.*, Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting) (stating that summary contempt is "an anomaly in the law"); Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L.Q. 1, 2 (arguing that contempt power seems "violative of basic philosophical approaches to the relations between government bodies and people").

4. Goldfarb, *supra* note 3, at 6.

5. In this Note, the phrase "inherent power" is used to mean powers derived from the Constitution, specifically the judicial grant of power in Article III.

6. Such as by being rude to the judge by using an "argumentative tone and [having a] disrespectful attitude." Debra Cassens Weiss, *Longtime Prosecutor is Fired After Judge Finds Him in Contempt for Alleged Disrespect*, A.B.A.J. (October 25, 2019), https://www.abajournal.com/news/article/longtime-prosecutor-is-fired-after-judge-finds-him-in-contempt-for-disrespect [https://perma.cc/693T-LYBM].

7. Contempt has been split into two categories: civil and criminal. Civil contempt occurs when a party fails "to obey a court order that was issued for another party's benefit," while criminal contempt is an "act that obstructs justice or attacks the integrity of the court." *Contempt*, BLACK'S LAW DICTIONARY (11th ed. 2019).

8. *See* 18 U.S.C. § 401.

9. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443 (1911); United States v. Barnett, 376 U.S. 681, 699–700 (1964); *see also* 18 U.S.C. § 401.

Because judges can both determine when a party is in contempt and punish that conduct, judges have broad powers to punish at will.[10]

Sometimes judges have used the contempt power in ways that are unduly oppressive rather than helpful to the justice system. For example, during the trial of the Chicago Seven—a well-known trial that involved a group of Anti-Vietnam War protestors—defendants were held in contempt of court and were imprisoned for months or even years.[11] One defendant, Bobby Seale, lashed out when the court would not allow him to be represented by his attorney; he was subsequently held in contempt, then bound and gagged by order of the court.[12] The contempt charges of all the defendants were eventually "either dismissed by higher courts or dropped by the government."[13] More recently, judges have used the contempt power to jail litigants who fail to pay fines for fine-only crimes.[14] Notwithstanding the Supreme Court's decision in *Tate v. Short*, which held that defendants may not be jailed for crimes for which the only punishment is a fine,[15] judges have used their contempt power to jail individuals who cannot afford to pay.[16]

Despite modern court practice, not all courts and scholars have been convinced that the power to punish contempts is inherent in, or should be exercised by, the judiciary. This has given rise to debate about whether the power is appropriately used by the courts, by Congress, or whether it should be used at all. In the past, Congress has attempted to limit the discretion judges have to hold parties in contempt.[17] Although these attempts have curbed judicial power to

10. This Note refers to both the power to discretionarily determine what conduct counts as contempt as well as the power to punish said conduct together as "the power to punish contempts."

11. *See* Robert Davis, *The Chicago Seven Trial and the 1968 Democratic National Convention*, CHI. TRIB., (Sept. 15, 2008), https://www.chicagotribune.com/nation-world/chi-chicagodays-seventrial-story-story.html [https://perma.cc/A2NZ-YGY9]; *Chicago Seven*, ENCYC. BRITANNICA (Sept. 17, 2020), https://www.britannica.com/event/Chicago-Seven-law-case [https://perma.cc/9N96-YMWV] (noting defendants were held in contempt for dastardly behavior such as "eating jelly beans, making faces, blowing kisses, wearing outlandish clothing, and cracking jokes" and explaining Judge Hoffman at one point had a defendant "bound and gagged for allegedly calling the judge a 'fascist dog,' a 'pig,' and a 'racist'"); *see also* Michelle Theriault Boots, *He Tested Positive for the Coronavirus. One Day Later, a Federal Prison Flew Him Home to Alaska.*, ANCHORAGE DAILY NEWS (May 27, 2020), https://www.adn.com/alaska-news/crime-courts/2020/05/26/he-tested-positive-for-the-coronavirus-two-days-later-a-federal-prison-flew-him-home-to-alaska/ [https://perma.cc/DF88-SZQT] (describing how a judge held a man released from prison in contempt of the court for failing to follow Alaska's fourteen-day quarantine).

12. Davis, *supra* note 11.

13. *Id.*

14. *See* Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/2NLS-MKQ4]; Ed Spillane, Opinion, *Why I Refuse to Send People to Jail for Failure to Pay Fines*, WASH. POST (April 8, 2016), https://www.washingtonpost.com/posteverything/wp/2016/04/08/why-i-refuse-to-send-people-to-jail-for-failure-to-pay-fines/ [https://perma.cc/76ZQ-UW5H].

15. Tate v. Short, 401 U.S. 395, 398–401 (1971).

16. *See* Spillane, *supra* note 14.

17. *See* Bloom v. Illinois, 391 U.S. 194, 203 (1968).

some extent, courts have maintained that the power is inherent and cannot be unduly limited.[18]

Whether the Founders thought the ability to punish contempt was part of the "judicial Power" has broad implications for Congress's ability to limit that power,[19] for the courts' ability to conduct executive action (i.e., executing the law through punishment rather than determining what the law is),[20] and for the courts' ability to use the contempt power to control coequal branches of government.[21]

When looking back at the historical record left by the Founders, it is not apparent that they would have considered the ability to hold parties in contempt to be part of the "judicial Power of the United States." At best, the historical evidence indicates inconsistent practices and beliefs among the states and Founders about whether courts had an inherent contempt power.[22] Despite this equivocal record, the history of the contempt power deserves analysis. Even where the contempt power is not explicitly mentioned, the writings and statements of the Founders about the general judicial power can be used to infer the state of the law vis-a-vis punishment for contempts.

Part I of this Note reviews how courts and scholars have conceived of the contempt power to date. Part II compares those conceptions with early understandings[23] of the judicial contempt power as by those prior to, during, and immediately after the establishment of the Constitution. By methodically tracing the history of the contempt power through the years surrounding constitutional ratification, this Note furthers a more accurate understanding of how the Founders perceived the contempt power, and whether they perceived such a power to be inherent in the judiciary. Although the historical record could be interpreted in multiple ways, the majority of the evidence demonstrates that the

18. *See* United States v. Barnett, 376 U.S. 681, 699–700 (1964).

19. The Supreme Court has stated that because the contempt authority is inherent in the judiciary, Congress is limited in its ability to restrict that power. Michaelson v. United States *ex rel*. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 65–66 (1924); *see also* Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in Inferior Federal Courts: A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1019–24 (1924).

20. Generally speaking, it is the executive branch that enforces the law, through prosecutors who bring suit against individuals. In the case of contempt, the court itself brings suit against individuals.

21. In the past, a President has been held in contempt of court for lying under oath. John M. Broder & Neil A. Lewis, *Clinton Is Found to Be in Contempt on Jones Lawsuit*, N.Y. TIMES, Apr. 13, 1999, at A1, https://www.nytimes.com/1999/04/13/us/clinton-is-found-to-be-in-contempt-on-jones-lawsuit.html [https://perma.cc/F2JV-3M8N].

22. In general, the different states had different forms of government in the years leading up to ratification. *See infra* Part II.B.

23. This Note utilizes both original intent and original public meaning analysis. "Original intent and original public meaning are generally thought to be opposing camps within originalism. Both theories assert that the meaning of a constitutional provision was fixed at the time it was enacted. But they disagree fundamentally on the nature of interpretation. Original intent asserts that the meaning sought is that intended by the Constitution's enactors. Original public meaning asserts that the meaning sought is that revealed by the text as reasonably understood by a well-informed reader at the time of the provision's enactment." John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. UNIV. L. REV. 1371, 1371 (2019).

Framers of the Constitution did not believe there was an inherent contempt power in the federal courts. Early American history shows that the Framers of the Constitution conceived of contempt as an inherently executive or legislative power, not a judicial one. The implication of this analysis is that Congress may properly limit the judicial contempt power.

I.
CURRENT UNDERSTANDING OF THE CONTEMPT POWER

For centuries, courts and scholars have claimed that an inherent constitutional contempt power exists independent of any congressional legislation delegating such a power to the judiciary.[24] This claim rests on a theory of inherent authority implicit in the "judicial Power," and vested in the federal courts by the Constitution. Part I.A reviews what the judiciary has written about its judicial contempt power throughout history. Part I.B then surveys existing scholarly literature on the same.

A. What the Judiciary Has Said About the Judicial Contempt Power

Supreme Court precedent is mixed as to whether the power to punish for contempt is an inherent power vested in the judiciary. An early Supreme Court case refers to the federal courts' power to hold parties in contempt as an inherent, rather than statutory, power of the courts. In *United States v. Hudson*, a case involving the contempt power, the Court stated that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution."[25] This decision exemplifies that, although there was a statute which authorized the courts to hold parties in contempt,[26] the Supreme Court maintained, shortly after the ratification of the Constitution, that the judiciary has inherent authority to punish contempts.

The Court has continued to assert inherent authority to punish contempts in the modern era as well. Even though Congress has passed further legislation limiting the use of the contempt power in the federal courts,[27] the Supreme Court has continued to claim that the federal courts have an inherent power to punish. In *United States v. Barnett*, the Court stated that "[t]he power to fine and

24. Congress delegated the federal judiciary a contempt power in the first session of Congress in 1789. An Act to Establish the Judicial Courts of the United States, ch. 20, § 17, 1 Stat. 73, 83 (1789) ("And be it further enacted, That all the said courts of the United States shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ."). This Note does address the contempt power of the courts granted by congressional statute but only seeks to determine whether there is a separate power to hold parties in contempt of court granted in the Constitution as an inherent judicial power.

25. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

26. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, § 17, 1 Stat. 73, 83 (1789).

27. *See* 18 U.S.C. §§ 401–402 (stating the conduct for which courts may hold a person in contempt); 18 U.S.C. § 3691 (explaining the process by which courts may hold a person in contempt).

imprison for contempt . . . . is a power inherent in all courts of record."[28] Furthermore, the Supreme Court has essentially upheld the power of courts to punish even absent a statutory grant of power. In *Willy v. Coastal Corporation*, the Court addressed whether a district court could impose Federal Rules of Civil Procedure Rule 11 sanctions on counsel even when the district court lacked subject-matter jurisdiction over a case.[29] The Court purported not to reach the question of whether courts have an inherent authority to punish, but at the same time held that the lower court could punish the litigants despite not having jurisdiction over the parties.[30] Courts only have authority to adjudicate a matter when they have subject-matter jurisdiction. Thus, when the Court stated that the district judge had the power to punish even without subject-matter jurisdiction, it effectively held that courts *do* have inherent authority to punish, regardless of any statutory grant or jurisdictional limitation.[31] The Court has also said that judges have the power to sanction, even outside of Rule 11. In *Chambers v. NASCO, Inc.*, a case where the district court sat in diversity jurisdiction, the Supreme Court upheld the district judge's inherent power to award plaintiff's attorneys' fees, even when that power had no basis in Rule 11 or state law.[32] Additionally, in *Chambers*, the Supreme Court upheld the district judge's use of the contempt power to punish conduct by the litigants exhibited in other courts.[33] Most strikingly in *Chambers*, the Court implied that the judiciary can use their inherent sanctioning powers even where the legislature has set limitations on sanctions.[34]

However, on other occasions the Court has conceded Congress's authority to regulate the use of the contempt power by lower courts. For example, in *Ex parte Robinson* the Court held that a district court's use of its contempt power to disbar an attorney violated a congressional statute.[35] The Court held that, pursuant to statute, courts could only hold parties in contempt for specific actions and that courts did not have discretion to hold parties in contempt for reasons of

28. United States v. Barnett, 376 U.S. 681, 699–700 (1964); *see also* Michaelson v. United States *ex rel*. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 65–66 (1924) ("That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over and subject, at once become possessed of the power.").

29. Willy v. Coastal Corp., 503 U.S. 131, 139 n.5 (1992) ("Our conclusion that the District Court acted within the scope of the Federal Rules and that the sanction may constitutionally be applied even when subject-matter jurisdiction is eventually found lacking makes it unnecessary for us to consider respondent's alternative contention that the sanction may be upheld as an appropriate exercise of the District Court's 'inherent powers.'").

30. *Id.*

31. *See id.*

32. Chambers v. Nasco, Inc., 501 U.S. 32, 42–44 (1991).

33. *Id.* at 57.

34. *See id.* at 50–51.

35. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 511 (1874).

their own choosing.[36] The Court thereby recognized that Congress can limit the lower courts' discretion in punishing contempts. The Court noted that the lower federal courts were only established by an Act of Congress. Therefore, Congress could also exercise control over the powers granted to the lower courts. This explanation has been used to justify jurisdiction-stripping statutes.[37] But it is not clear that jurisdiction-stripping is the same as denying courts the power to punish contempts, as courts have argued that the power to punish contempts is a necessary tool in the judicial process.[38] By contrast, when Congress strips a court's jurisdiction, the court simply cannot hear the case. Therefore, by conceding that Congress can regulate the contempt power, the Supreme Court has implied that the contempt power is not inherent in the "judicial Power."

Additionally, the Court has also assented[39] to other restrictions on contempt that have been mandated by Congress, such as the requirement that indirect contempts[40] be tried by jury upon the request of the accused.[41] Furthermore, some justices have seriously questioned the use of the contempt power, at least in its summary form,[42] as inconsistent with the judicial power as conceived by the Framers. Writing for the dissent in *Green v. United States*, Justice Black stated the following: "[t]he power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law."[43] Justice Black went on to note that although the contempt power of the judiciary started off as a trivial power in the courts to preserve order, *after* the adoption of the Constitution, the power began to expand at the hands of judges who sought to exercise it more freely.[44] Justice Black, therefore, found that the exercise of the contempt power as used after the enactment of the Constitution was contrary to the principles underlying the Constitution and the Bill of Rights.[45]

Thus, there have been mixed opinions in Supreme Court precedent about whether the power to punish for contempt is an inherent power vested in the

36. Under the original congressional grant of authority in 1789, courts could effectively hold parties in contempt for any reason. *See* Goldfarb, *supra* note 3, at 14.

37. RICHARD H. FALLON JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 295–303 (7th ed. 2015).

38. *See* United States v. Barnett, 376 U.S. 681, 699–700 (1964).

39. *See* Bloom v. Illinois, 391 U.S. 194, 203–04 (1968).

40. Indirect contempts are acts of contempt which occur outside of the courtroom. 7A FRANCIS M. DOUGHERTY & ROBERT B. MCKINNEY, FEDERAL PROCEDURE § 17:3 (Laws. ed. 2021).

41. *See* 18 U.S.C. § 3691.

42. Summary contempt proceedings are proceedings in which the court adjudicates whether the person is in contempt of court without pleading, affidavit, or formal charges. Courts have limited the instances in which summary contempt can be used, but have not eliminated the power altogether. Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 830 (1994) ("[T]he Court has erected substantial procedural protections in other areas of contempt law, such as . . . summary contempts." (internal citations omitted)); 7A FRANCIS M. DOUGHERTY & ROBERT B. MCKINNEY, FEDERAL PROCEDURE § 17:3 (Laws. ed. 2021) ("[S]ummary adjudication of indirect contempts—that is, those occurring out of court—is prohibited.").

43. Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting).

44. *Id.* at 207–08.

45. *Id.* at 208–10.

judiciary or whether it derives from congressional statute and can therefore be limited or stripped by Congress. The cases that have found an inherent power to punish have been mistaken in their understanding of where the courts' authority to punish derives from. Although the Court has stated that the power is necessary and thus inherent, and that the power has been used by courts in the past, it has failed to tie that claim of authority to accurate analysis of the Founders' intent in drafting Article III. As shown in Part II, *infra*, an originalist analysis of Article III demonstrates that no such inherent power exists.

B. What Scholars Have Said About the Judicial Contempt Power

There has also been debate among scholars about whether the contempt power is inherent in the judiciary. Part I.B.1 reviews the argument against an inherent contempt power; Part I.B.2 examines the argument in favor.

1. The Contempt Power Is Not Inherent to the Judiciary

Ronald Goldfarb has concluded that the judicial power to punish contempts, though accepted in early American history, should not be thought of as inherent in the courts. Goldfarb stated that the contempt power has been so accepted in Anglo-Saxon law that its existence or necessity in the judiciary is hardly ever questioned.[46] There has been a paucity of scholarship on the origins, implications, and scope of the contempt power relative to its ability to coerce individual litigants and the government. Yet, to the layperson, the power seems violative of the basic relationship between the government and the people because it allows judges to punish at their discretion with minimal process. Goldfarb related that cases both in England and the United States often treat the contempt power as an inherent one in the judiciary, and one that the judiciary could not function without.[47]

In his article, Goldfarb traced the origins of the contempt power back to the supposed divinity of kings in the medieval period and the idea that disobeying the king's agents (i.e., judges) was tantamount to disobeying the divinely ordained monarch.[48] Goldfarb argued that, eventually, courts began to claim that the power to punish was inherent in the judiciary itself as an incidental and necessary tool of the judicial role.[49] Goldfarb traced that development back to the English contempt case *The King v. Almon*, decided by English Chief Justice Wilmot.[50]

Almon suggested that summary contempt was a necessity for the courts, and that disrespect to the judge was effectively disrespect for the law. Courts and scholars inappropriately cited the *Almon* case to expand the reach of the

46. Goldfarb, *supra* note 3, at 1.
47. *Id.* at 2.
48. *Id.* at 7–8.
49. *Id.* at 8.
50. *Id.* at 11.

contempt power. According to Sir John Charles Fox, who thoroughly analyzed *Almon*, English and American judges used dicta from *Almon* despite the fact that the opinion was never officially published during Chief Judge Wilmot's life and did not reflect the law of the time.[51] Fox also noted that the dicta in *Almon* went further than English courts had ever gone before in asserting that the contempt power was necessary to maintain the dignity of the courts, and that the summary contempt power hadn't been used in the past. Even though the *Almon* opinion was anomalous and only posthumously published years after the *Almon* case was resolved, later English courts adopted Chief Justice Wilmot's reasoning and expanded the scope of their power to punish contempt even further.[52]

Courts and scholars were mistaken to rely on *Almon* in determining the scope of the contempt power during the founding. The notes of *Almon* were not published until after the ratification of the Constitution.[53] If, as Fox asserted, *Almon* expanded the traditional understanding of contempt,[54] then *Almon* is not reflective of how the Founders conceived of the contempt power when drafting and ratifying the Constitution and the "judicial Power." Goldfarb did note that Chief Justice Wilmot and William Blackstone, the famed British jurist and author, were acquainted, and that Blackstone consulted with Wilmot on the law of contempt.[55] This is significant to the originalist understanding of the contempt power because the Founders were heavily influenced by the writings of Blackstone.[56] However, as covered below, Blackstone's commentaries espouse a far more king-centric conception of the contempt power than the *Almon* notes do.[57]

Although Goldfarb made compelling normative policy arguments against punishment for contempts, his assertion that the contempt power was accepted by early courts deserves critical examination. Goldfarb's research frequently referenced an earlier influential article by Justice Felix Frankfurter and Professor James Landis on the power of Congress to regulate criminal contempt proceedings, which bears on the inherent power of the courts to hold parties in contempt.[58] Frankfurter and Landis focused most closely on colonial British practice and the Acts of Congress post-ratification,[59] and found that Congress does have authority to regulate the procedure of contempt trials. However, they did not go so far as to say that Congress has authority to abolish all punishment for contempts of court.[60] They also failed to analyze how states approached the

51. JOHN C. FOX, THE HISTORY OF CONTEMPT OF COURT: THE FORM OF TRIAL AND THE MODE OF PUNISHMENT 5–16 (1927).
52. Frankfurter & Landis, *supra* note 19, at 1046–47, 1049 n.139.
53. *Id.*
54. FOX, *supra* note 51, at 5–16.
55. Goldfarb, *supra* note 3, at 13.
56. *See* discussion *infra* Part II.A.
57. *See* discussion *infra* Part II.A.
58. Frankfurter & Landis, *supra* note 19, at 1023.
59. *See id.* at 1018, 1047.
60. *See id.* at 1020–22.

issue after the revolution, as well as in the years leading up to the ratification of the Constitution.[61]

Evidence of the Framers' conception of the contempt power is limited, but there are clues that suggest the contempt power was not thought of as an inherent power in the courts until several years after the Constitution was ratified.[62] Therefore, the contempt power cannot be accurately described as part of the original meaning of the "judicial Power."[63]

2. The Contempt Power Is Inherent to the Judiciary

Professor Robert J. Pushaw, Jr. has made the case that punishing contempt is an inherent power of the federal judiciary vested in the specific provisions and general structure of the Constitution.[64] Professor Pushaw argued that the inherent Article III powers of the federal courts are those that are indispensable to the functioning of the courts and are "rooted in historical Anglo-American practice."[65] Professor Pushaw asserted that those powers cannot be negated or "materially abridg[ed]" by Congress "[b]ecause the Constitution itself gives federal courts implied authority that is essential to their independent exercise of judicial power."[66] Pushaw asserted that the implied authority derives from the fact that Article III of the Constitution "establishes 'courts'" and that "[a]ny Anglo-American 'court,' to be worthy of that name, must have the ability to maintain its authority . . . . Such control sometimes bears no direct relationship to adjudication . . . . [J]udges must have power to punish misbehavior in their presence."[67]

However, Professor Pushaw's thesis with respect to the Founders' views of contempt and what powers they thought were indispensable to courts is substantially flawed. Similar to Goldfarb, Professor Pushaw traced the original contempt power back to respect for the Crown, but also argued that the power became an inherent one through practice and codification by parliament.[68] However, this argument is flawed because inherent power only truly began taking root in traditional court practice after the *Almon* case. In addition,

61. *See id.* at 1010 n.3. Other scholars like Professor Louis Raveson have ignored the history of the contempt power but instead argued that such power interferes with individual rights guaranteed by the Constitution. *See generally* Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power*, 65 WASH. L. REV. 477 (1990) (arguing the Constitution should limit the contempt power so that it may only be used to punish actual obstructions of the administration of justice). Raveson also cited an article by Ronald Goldfarb for the proposition that commentators have challenged "courts' frequent declarations that the contempt power has always been an inherent power of common law courts." *Id.* at 485 n.22.

62. *See* discussion *infra* Part II.

63. *See* discussion *infra* Part II.

64. Pushaw, *supra* note 2, at 741–42.

65. *Id*.

66. *Id.* at 742.

67. *Id.*

68. *Id.* at 800, 806, 815–16.

codification of the power by parliament did not occur until after the founding.[69] Therefore, it could not have informed the meaning of the Constitution.

Professor Pushaw's article also looked at the historical record of the colonial and post-revolutionary courts. But in drawing his eventual conclusion that courts have an inherent contempt power, he gave far greater weight to the pre-independence courts than he did to the revolutionary courts.[70] In doing so, he focused on a period that has limited relevance to an understanding of how the Founders conceived of the judicial power when the Constitution was written and ratified.[71] Professor Pushaw conceded that the judges in the post-revolution states were "weak and dependent" but asserted that because of that weakness they were "of marginal relevance" in determining the inherent authority of the federal courts.[72] But this statement fails to recognize that the weakness of judges after the revolution is relevant, as it illustrates how the Founders during that time would have thought about the judiciary. The Revolution was an event that entirely reshaped how the government was structured.[73] The Founders intended to weaken the judiciary post-Revolution, as weak courts were more consistent with their views on the separation of powers.[74] Furthermore, under Article III of the Constitution, Congress was not obligated to create lower federal courts. Therefore, the state courts served as the default courts where federal law would be enforced.[75] Thus, the post-revolutionary state courts of limited power should be looked at as having at least those powers the Founders bestowed on the federal judiciary. As such, state court practice is relevant to the inquiry on whether federal courts were thought to possess inherent punishing powers. Their practices should be given equal or greater weight to those of pre-independence courts.

Scholars who asserted that the "judicial Power" encompasses the power to punish contempts either looked at inappropriate sources, such as *Almon*, or otherwise gave greater weight to historical evidence than that evidence deserved. In light of the confusion among the judiciary and scholars, Part II attempts to methodically trace the different conceptions of the judicial power vis-à-vis contempt throughout early American history, and explain why certain sources and periods are more relevant than others. In doing so, Part II demonstrates that the Founders did not think that courts had inherent authority to punish for actions that the courts considered contempt.

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69. *See supra* Part I.B.1 (discussing the timeline of *Almon*).
70. *See* Pushaw, *supra* note 2, at 821.
71. *See* discussion *infra* Part II.A–B.
72. Pushaw, *supra* note 2, at 821.
73. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 136–61 (1998).
74. *See id.* at 155–56, 161.
75. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 125 (Max Farrand ed., 1911); *see also* Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and New Synthesis*, 124 U. PENN. L. REV. 45, 52–56 (1975) (discussing the Madisonian compromise).

II.
ORIGINS OF THE CONTEMPT POWER

There are several key sources this Note focuses on to determine whether the Founders intended the Constitution to grant the federal courts the power to punish contempts. For clarity, Part II addresses the various sources on the meaning and scope of the contempt power in chronological order, beginning with British constitutional history and ending in the period shortly after the U.S. Constitution was ratified. Tracing the meaning of the contempt power over time also provides a perspective on how the Framers' thoughts regarding the contempt power changed during different periods and how they thought of the contempt power during the constitutional convention and ratification debates.

Part II.A reviews British constitutional history and colonial practice regarding the judiciary's contempt power. Part II.B moves to the revolutionary period, reviewing state constitutions, common law decisions, and the Articles of Confederation leading up to the Constitution. Part II.C discusses the debates surrounding the Constitution, largely exploring *The Federalist* and the ensuing state ratification debates. And lastly, Part II.D reviews the early post-ratification views of the President, Congress, and the courts surrounding the judicial contempt power.

A. Conceptions of the Contempt Power During the Colonial Period: British Constitutional History and Colonial Practice

Part II.A demonstrates the influence of the English courts on the thoughts of the Founders and the important differences between those courts and the courts that were later developed under the Constitution in the United States. Crucially, the power of English courts was derived from the King, whereas the American judicial branch is separate and has power independent of the executive branch. The separation of powers is of pivotal importance in determining how the contempt power was allocated among the branches of government under the Constitution. Part II.A.1 reviews British constitutional history and Part II.A.2 reviews early colonial practice.

1. British Constitutional History

In tracing the allocation of the contempt power, it makes the most sense to begin with English constitutional history. English common law and court practice served as the basic framework for the colonial judiciary.[76] Since many of the Founders were learned in the law, they would have been well aware of English practice. *Commentaries on the Laws of England* by William Blackstone was one of the influential English works on the common law that the Founders

76. *See* WOOD, *supra* note 73, at 10.

relied on, and thus, eventually influenced the framing of the Constitution.[77] During the founding era, Blackstone was one of the more commonly cited sources on English common law.[78] Blackstone's *Commentaries* were so important that they were included among the list of books prepared by James Madison in 1783 to "constitute the intellectual nucleus for a library for the Congress."[79] They were also included among the books offered to Congress by Thomas Jefferson, who contributed a copy from his own collection after the Library of Congress had been burned by the British in 1814.[80] Additionally, the very beginnings of structured legal education in America were based on Blackstone's *Commentaries*.[81] Blackstone was so well known to the Founders that he was referred to by name in the *The Federalist* multiple times.[82]

Blackstone's work is relevant in understanding the contempt power because the *Commentaries* referred to contempt in numerous passages and described the different types of contempts at length.[83] It is fair to assume that the Founders were aware of Blackstone's conception of the power to punish contempt when drafting and ratifying the Constitution. Although Blackstone refers to English courts as having the power to punish contempts, there is reason to believe that the Founders who carefully studied the *Commentaries* would not have wanted those same powers to inhere in American federal courts. The Founders would not have believed that the phrase "judicial Power" granted federal courts the historical power of English courts because the structure of American government differed fundamentally from that of the English government.[84] English judges served as officers of the executive branch (i.e., the

77. *See id.*; Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 767–68 (1976).

78. WOOD, *supra* note 73, at 10, 14. Blackstone was also referenced during the ratification debates in the states. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 544 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1866) [hereinafter ELLIOT'S DEBATES]; 2 ELLIOT'S DEBATES 424.

79. List of Books Prepared by James Madison in 1783 to Constitute the Intellectual Nucleus for a Library for the Congress (photograph), LIBR. OF CONGR. (1783), https://www.loc.gov/item/2002707211/ [https://perma.cc/RUZ3-HEDC]; *Report on Books for Congress, [23 January] 1783*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-06-02-0031 [https://perma.cc/HV27-STHN].

80. CATALOGUE OF THE LIBRARY OF THE UNITED STATES 73–74 (Jonathan Elliot, ed. 1815); Luther H. Evans, *Foreword* to 1 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON, at vii, vii–viii (E. Millicent Sowerby ed., 1952); *Thomas Jefferson to Samuel H. Smith*, *in* 7 THE PAPERS OF THOMAS JEFFERSON RETIREMENT SERIES 681, 681–84 (J. Jefferson Looney ed., Princeton Univ. Press 2010) (1814).

81. *See* John H. Langbein, *Blackstone, Litchfield, and Yale: The Founding of the Yale Law School*, *in* HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES 17, 20–23 (Anthony T. Kronman ed., 2004).

82. *See* THE FEDERALIST NOS. 69, 84 (Alexander Hamilton).

83. 4 WILLIAM BLACKSTONE, COMMENTARIES *119–26.

84. *See* WOOD, *supra* note 73, at 136, 148–50.

King).[85] However, in America, the Founders separated the executive and judicial branches of government, vesting judges with independent power apart and away from the executive branch.[86] Because American judges were not agents of the Crown, the question arises whether the power to punish contempts remained vested in the judicial branch. If the power to punish stemmed from the King, judges would have no such power absent their connection to the King.

In his *Commentaries*, Blackstone explained that the justification for the power to punish contempts is based on vindicating the King's dignitary interests and lawmaking authority.[87] In other words, judges punished contempt because when litigants disrespected the judge, they ultimately disrespected the King. One definition of contempt in the *Commentaries* defined actions taken "against the king's prerogative . . . . by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice" as contempt.[88] The definition further stated that "[d]isobedience to any of these commands is a . . . contempt."[89] This definition demonstrates that holding a party in contempt of court was a response to individuals indirectly disobeying the orders of the Crown rather than a response to individuals disobeying or disrespecting the judge in his own right.

Furthermore, Blackstone listed several activities that were considered contempts under the common law.[90] Examination of those activities further indicates that it was the King's dignity rather than the judge's being vindicated.[91] Because the power to punish was used to vindicate the King's authority, the power to punish ultimately stemmed from the Crown's executive authority, and not from any judicial necessity per se.[92] Additionally, because the King was the ultimate lawmaker, disobeying the King's command was a crime in its own right, which further justified punishing that conduct. Disrespecting the judge, who was often a member of the peerage, was punished not pursuant to contempt of court but rather pursuant to an infraction called *scandalum magnatum*,[93] which was a separate offense in England, unrelated to contempt. If contempt was about

85. 3 WILLIAM BLACKSTONE, COMMENTARIES *23–24; 4 WILLIAM BLACKSTONE, COMMENTARIES *122; *see also* WOOD, *supra* note 73, at 154 (noting Americans feared "royally controlled judges").

86. The founders were influenced by Montesquieu's *Spirit of Laws*, which espoused a government based on the separation of powers. WOOD, *supra* note 73, at 152; *see also* THE FEDERALIST NO. 78 (Alexander Hamilton) (citing Montesquieu's *Spirit of Laws*).

87. 3 WILLIAM BLACKSTONE, COMMENTARIES *24–25 ("All courts of record are the king's courts, in right of his crown and *royal dignity*, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with power of fine or imprisonment makes it instantly a court of record.") (emphasis added).

88. 4 WILLIAM BLACKSTONE, COMMENTARIES *122.

89. *Id.*

90. *Id.* at *121–26 ("Contempts against the king's prerogative . . . . Contempts and misprisions against the king's person and government . . . . Contempts against the king's title . . . . Contempts against the king's palaces or courts of justice.").

91. *Id.*

92. *See id.* at *122.

93. *Scandalum Magnatum*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Goldfarb, *supra* note 3, at 11.

vindicating the judge's dignity, the separate offense of *scandalum magnatum* would have been superfluous.

Pushaw and others have argued that although it was the King's dignity and lawmaking authority being vindicated, it was still the judge's power which allowed them to punish contempts.[94] In the *Commentaries*, Blackstone stated that, "[a] power . . . to suppress [] contempts . . . must be an inseparable attendant upon every superior tribunal," implying that the contempt power was one indisputably given to the courts at the time.[95] Scholars, such as Professor Pushaw, have relied on this statement in the *Commentaries* to demonstrate that Blackstone believed that English courts had an inherent power to punish contempt.[96] However, this statement in the *Commentaries* may have been a result of conversations between Blackstone and Justice Wilmot and may therefore not accurately reflect English practice.[97]

Even if Blackstone's statement in the *Commentaries* was not an accurate reflection of English practice, the statement still would have been highly influential on the Founders since their information on English practice came from Blackstone's work.[98] Therefore, one could argue that the Founders may have assumed that even absent the connection with the executive branch, judges would still have the authority to hold parties in contempt consistent with the reasoning of *King v. Almon*. However, when Blackstone's statement was read in context it would have been clear to the Founders that any inherent authority in the judges was really an inherent authority in the King. The paragraph specifically refers to the court as the King's agents and suggests that the authority rests with the King.[99] Taken together, the statement simply stands for the proposition that an indignity to the King's agents allows those agents (i.e., the judges) to hold the party in contempt. Blackstone made it abundantly clear that only agents of the King had the power to punish.[100] The view of independent judicial powers fundamentally misrepresents how closely connected the judges and the Crown were during Blackstone's era in England. Judges acted on behalf

94. Pushaw, *supra* note 2, at 806, 813–14, 813 nn.415 & 417, 817.

95. 4 WILLIAM BLACKSTONE, COMMENTARIES *282.

96. Pushaw, *supra* note 2, at 814.

97. Eberhard P. Deutsch, *Liberty of Expression and Contempt of Court*, 27 MINN. L. REV. 296, 300 (1943) ("Wilmot and Blackstone, as friends, unquestionably discussed this opinion . . . . And while the earlier authorities were directly to the contrary, as already demonstrated, it was on the basis of this 'opinion,' never even rendered, that Blackstone referred, in his Commentaries, published later in the same year, to 'the method, immemorially used by the superior courts of justice, of punishing contempts by attachment.'").

98. *See* Nolan, *supra* note 77, at 768.

99. 2 WILLIAM BLACKSTONE, COMMENTARIES *284–88.

100. 3 WILLIAM BLACKSTONE, COMMENTARIES *24 ("All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record. A court not of record is the court of a private man, whom the law will not [e]ntrust with any discretionary power over the fortune or liberty of his fellow-subjects.").

of the King, were part of the executive branch, and had no powers independent of the King:

> A court is defined to be a place wherein justice is judicially administered. And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown. For whether created by act of parliament, letters patent, or prescription, (the only methods of erecting a new court of judicature) the king's consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is supposed in contemplation of law to be always present; but, as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.[101]

The *Commentaries* are explicit in stating that the power of judges derives from the King and that the King is always present in the administration of justice.[102] Judges were considered extensions of the King and so all of their powers were really the King's powers.[103] It would have been impossible for Blackstone to conceive of a court that didn't have the contempt power, since all contemporary courts were agents of the Crown.[104]

An earlier source that provides background on how the Founders considered the judicial power is Coke's *Institutes of the Lawes of England*, which also references contempt. Like Blackstone's *Commentaries*, Coke's *Institutes* was among both the list of books recommended for the Library of Congress by James Madison and the books donated to the Library of Congress by Thomas Jefferson.[105] Coke's *Institutes* provides another example of the limitations on the English judicial contempt power.

One passage in Coke's *Institutes* stated that the power to punish for contempts was temporarily granted to the judiciary pursuant to an act of parliament.[106] The *Institutes* related a story wherein an act of parliament purported to grant all judges the power to punish people for "contempts" as well as other offenses based simply on information brought before the King.[107] However, the *Institutes* related that because the statute led to undesirable

101. 3 WILLIAM BLACKSTONE, COMMENTARIES *23–24.

102. 1 WILLIAM BLACKSTONE, COMMENTARIES *257 ("[T]he king is considered . . . the fountain of justice . . . . And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.").

103. *Id.*; 3 WILLIAM BLACKSTONE, COMMENTARIES *23–24.

104. 1 WILLIAN BLACKSTONE, COMMENTARIES *257; 3 WILLIAM BLACKSTONE, COMMENTARIES *23–24.

105. *Report on Books for Congress*, *supra* note 79; 1 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON, *supra* note 80, at vi–viii.

106. 2 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 50 (London, M. Flesher & R. Young 1642).

107. *Id.* at 51.

consequences, it was subsequently repealed.[108] Other references in the *Institutes* to the power of punishing contempts are all related to contempts against the King's dignitary interests, such as when individuals left court without the King's permission, when nobles married without the King's permission, or when individuals hid information about treason from the King.[109] Coke's anecdote about the act of parliament indicates, on the one hand, that the power to punish could derive from parliament as well as directly from the King, showing that it was not necessarily an exclusively royal power. On the other hand, the contempts the act was designed to address were all contempts against the King or violations of statutes, rather than conduct which disrespected judges themselves.[110] It is also noteworthy that the *Institutes* specified that the act was repealed because it gave judges too much power and discretion to imprison parties when the parties had not actually acted in violation of the law.[111] Because the act was repealed, the only authority judges had left to punish for contempts was the authority as the agents of the King.[112]

As such, the Founders, deliberating a century after Coke's *Institutes* was published, would not have thought that judges had any inherent power (other than that conferred by the King) to hold parties in contempt.[113] The stories shared by Coke with regard to contempt relate to contempt against the King, oftentimes in parliament or other non-judicial settings, rather than contempt of the King in court or of the court itself.[114] Therefore, Coke's *Institutes* would only have highlighted to the Founders that contempt was not a power inherent in the courts but rather a power inherent in the King as executive and lawmaker.

In another source describing the English judiciary, there are examples of English courts punishing contempts in a way that appears to challenge the authority of the royal family and the Crown. In his book about the lives of the Chief Justices of England, Baron John Campbell (himself a Chief Justice) related a story wherein Chief Judge Sir William Gascoigne held the son of King Henry IV in contempt of court for disrespecting a criminal judge.[115] The story exemplifies the power of judges to punish contempt—it was so inherent that it could even be used against the King's family. However, Chief Judge Gascoigne sat at the King's pleasure[116] rather than during good behavior[117] like later judges. According to Campbell's narrative, King Henry IV was pleased, rather than distraught, at the fact that the Chief Judge had followed the law and held the

108. *Id.*
109. *Id.* at 49.
110. *Id.* at 51.
111. *Id.*
112. *Id.*
113. *See id.*
114. *See id.* at 49–51.
115. 1 JOHN CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 128 (Jersey City, Fred D. Linn & Co.1881).
116. Meaning the King could remove him at will for any reason.
117. Meaning the King could only remove a judge for misbehavior.

Prince in contempt.[118] The story is striking because the Prince, then held in contempt, would one day become King Henry V. Therefore, even in this extreme example, the King had ultimate authority to remove the judge if the judge exercised his power in a way contrary to the King's will. Thus, the power to punish still traced back to the Crown.

Because the Founders restructured the government in America into a system of separated powers, it would not have made sense to them to say that judges retained the traditional authority of the executive.[119] Disobeying a judicial command or disrespecting a judge no longer harmed the dignity of the executive or legislative branches because the judiciary represented only itself.[120] Therefore, if the Founders were reading Blackstone and Coke, they would not necessarily have believed that judges continued to exercise an inherent power to punish. Any contempt power they would have thought judges had would have been a power delegated by the other branches of government. Finally, the power to punish contempts was not exclusively exercised by the judiciary, but also by parliament and the King.[121] Therefore, the Founders would have realized that the contempt power was not solely a judicial power.

2. Contempt in the American Colonies

In the colonies, the courts exercised the contempt power on numerous occasions. For example, in *Thwing v. Dennie*, a Massachusetts colonial court imprisoned a litigant for trying to snatch the documents out of the hands of an opponent in court.[122] However, the historical record indicates that the colonial courts were intimately tied to the executive, even more so than the English courts.[123] There existed a persisting idea that the King was "always present" in the administration of justice through his representation by the colonial judges.[124] Additionally, the court of last resort in the colonies was the English Privy Council, the personal council of the King.[125] Appeal to the Privy Council had ceased in English courts, but the practice continued in the colonies, which frustrated the colonists.[126] During the colonial period, Founders such as John Adams maintained that the administration of justice fell within the executive function.[127] All judicial power in the colonies could be traced back to the King's

118. 1 CAMPBELL, *supra* note 115, at 128.
119. *See* WOOD, *supra* note 73, at 160–61.
120. *See, e.g.*, U.S. CONST. art. III.
121. 1 WILLIAM BLACKSTONE, COMMENTARIES *160 ("To assault by violence a member of either house, or his menial servant, is a high contempt of parliament, and there punished with the utmost severity."); *id.* at *257.
122. Thwing v. Dennie, Quincy (Mass.) Rep. 338 (1772).
123. *See* WOOD, *supra* note 73, at 159.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

prerogative to enforce the law.[128] Therefore, during the colonial era, all judicial power was thought to extend from the powers of the King rather than from independent judicial authority.

Importantly, one should not assume that the Founders incorporated all of the traditional common law powers of the English judiciary into the federal judiciary established by the Constitution. The American public during the colonial and revolutionary eras was far more distrustful of the courts than the English public was of the courts in England, and The American public was unlikely to trust courts with broad powers.[129] It is arguable that the distrust of the colonial judges was tied to the fact that colonial judges did not sit "during good Behaviour" like their English counterparts and were therefore more dependent on the King.[130] Since the colonists primarily harbored mistrust against the King, one could argue that when judges gained independence they were more deserving of public trust. However, as explained below, even after the colonies gained independence, the state governments remained mistrustful of judicial discretion in their now independent courts. Although the Founders saw themselves as continuing common law traditions, the Revolution and eventual establishment of the Constitution led to a significant break with the English system of government and law.[131]

The evidence from Blackstone, Coke, and colonial practice alone are insufficient to show what powers were thought to be inherent in the judiciary after the colonies separated from England. Although the power of the courts was thought to derive from their role as representatives of the King during the colonial era, the courts were given independent power in the structure of government after the Revolution. After the Revolution, almost all of the states broke apart the traditional connection between the courts and the executive and set up a more independent judiciary.[132] The restructuring of government and independent power of the judiciary raise the question of where the contempt power "ended up": whether it was thought to remain with the executive, the judiciary, or elsewhere. To determine the answer to that question, this Note turns to revolutionary period sources.

B. Conceptions of the Contempt Power During the Revolutionary Period: State Constitutions, Common Law Decisions, and the Articles of Confederation

While the English framework provides an important background, the actions of the states after independence demonstrated new ideas for how governmental powers could be allocated. Because the separation from England

128. *Id.* at 159–60.
129. *Id.* at 298.
130. *Id.* at 294.
131. *See id.* at 136–61.
132. *Id.*

caused many changes in both government structure and political ideology, the way in which the early states conducted themselves differently from England is informative of what powers the Founders thought different branches of government should be able to exercise in their new nation.

As noted above, the American public became increasingly wary of the courts over time.[133] After the Revolution, many in the American bar were hostile to England and the common law that came from it.[134] This hostility stemmed, in part, from the clashes between colonial assemblies and the King's courts which contributed to the friction that sparked the revolution.[135] Therefore, judicial tyranny was one of the grounds for revolt.[136] English law was so reviled that some of the lawyers and judges during the post-revolutionary period advocated for the adoption of French rather than English legal practice,[137] and several states specifically prohibited the citation of English precedent in post-revolutionary courts.[138] Although the suggestion of adopting French law was not accepted in

133. *See id.* at 298 ("[C]olonists [had] a profound fear of judicial independence and discretion, reflected in their repeated resort to written charters and to legislative intervention either by direct interference in the process of adjudication or by the correction and amendment of court-administered law by statute.").

134. *Id.* at 300–01; 7 NEW JERSEY HISTORICAL SOCIETY, COLLECTIONS OF THE NEW JERSEY HISTORICAL SOCIETY 309 (Newark, Martin R. Dennis & Co. 1872); *see also* Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 143–44 (1829); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 116 (1921) ("After the Revolution the public was extremely hostile to . . . all that was English and it was impossible for the common law to escape the odium of its English origin."); James R. Maxeiner, *A Government of Laws Not of Precedents 1776–1876: The Google Challenge to Common Law Myth*, 4 BRIT. J. AM. LEGAL STUD. 137, 144–48, 154–55 (2015).

135. Pushaw, *supra* note 2, at 820.

136. *See* THE DECLARATION OF INDEPENDENCE paras. 11–12 (U.S. 1776).

137. WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT, LL.D. 117–118. (Cambridge, Little, Brown, & Co. 1898).

138. For example, New Jersey adopted the following statute:

> [T]hat no adjudication decision or opinion made, had, or given in any court of law or equity in Great Britain or any cause therein depending, nor any printed or written report or statement thereof, nor any compilation, commentary, digest, lecture, treatise, or other explanation or exposition of the common law, made, had, given, written, or composed since the fourth day of July, in 1776, in Great Britain, shall be received or read in any court of law or equity of this State, as law, or evidence of the law, or elucidation or explanation thereof, any practice, opinion, or sentiment of the said courts of justice, used, entertained, or expressed to the contrary hereof notwithstanding.

7 NEW JERSEY HISTORICAL SOCIETY, *supra* note 134, at 90–91; *see also id.* at 309 ("[A]ct of Assembly passed in 1779 . . . forbade the reading in our courts of any adjudication, decision, digest, or book, made in Great Britain after the year 1776."). Another example can be found in a Kentucky statute which stated that, "All reports and books containing adjudged cases in the kingdom of Great Britain, which decisions have taken place since the 4th of July 1776, shall not be read, nor considered as authority in any of the courts of this commonwealth, any usage or custom to the contrary notwithstanding." 1 WILLIAM LITTELL, REPORTS OF CASES AT COMMON LAW AND IN CHANCERY, DECIDED BY THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY, at iv (Louisville, Geo. G. Fetter Printing Co. 1898). Virginia had similar laws, such as the Act of December 27, 1792. *See* GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–1815; 2 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES, at vii, 562 (Stanley N. Katz, ed., 2010). New Hampshire also adopted a rule against English precedent. *See* Charles R. Corning, *The Highest Courts of Law in New Hampshire*, 2 THE GREEN BAG 469, 470 (1890). And John Dudley

the end, the suggestion demonstrates the prevailing sentiments towards the traditional common law powers of the courts. This is noteworthy because French courts did not exercise an inherent power to punish contempts.[139]

Therefore, in analyzing the contempt power, this Note is cautious of imputing any elements of English court practice to the powers of revolutionary-era state courts. The revolutionary-era states did end up adopting parts of the common law but only insofar as those parts made sense in the local framework. The revolutionaries committed to discarding practices that were incompatible or unwieldy.[140] If any action could be considered judicial tyranny akin to the tyranny of the courts in the colonial period, judicial discretion to punish for contempt would be it. The idea of a judicial power to punish contempts would have been out of place in a society that so distrusted judicial overreach. Therefore, it would make sense for post-revolutionary governments to have stripped the courts of the power to punish contempts at their sole discretion. To assess this hypothesis, Part II.B.1 examines the state constitutions and court decisions during the revolutionary period. Part II.B.2 then explores the Articles of Confederation.

1. Contempt in the Revolutionary State Constitutions and Court Decisions

One group of sources that speaks directly to the allocation of governmental power within the independent states is the early state constitutions, several of which were adopted right after independence was declared. Few of the early state constitutions explicitly mention a power to punish for contempt. The constitutions that *do* explicitly mention the power to punish for contempt or misbehavior specifically vest the power to punish for contempts in the legislature or executive, rather than the judiciary. The contempt power exercised by those branches closely mirrors the contempt power as used by the modern federal judiciary in both phrasing and application, demonstrating that it is the same

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who sat in the Superior Court of New Hampshire in the last decade of the eighteenth century used to say,

> They would govern us by the common law of England. Trust me, gentlemen, common sense is a much better guide for us . . . . It is our business to do justice between the parties, not by any quirks out of the law out of Coke and Blackstone, books that I never read, and never will.

A New Hampshire Judge of the Olden Time, 17 LITTELL'S LIVING AGE 55, 55 (1870); *see also* POUND, *supra* note 134, at 116.

139. Michael Chesterman, *Contempt: In the Common Law, but Not the Civil Law*, 46 INT'L & COMP. L.Q. 521, 557 (1997).

140. WOOD, *supra* note 73, at 299–301; *see also* Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144–45 (1829) ("The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."); William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 424–25 (1968).

power being used.[141] And, the state constitutions were extremely influential on the Federal Constitution.[142]

Maryland serves as an illuminating example of how contempt was exercised during the revolutionary period. The only mention of the contempt power in Maryland's 1776 Constitution states the following: "That the House of Delegates may punish, by imprisonment, any person who shall be guilty of a contempt in their view, by any disorderly or riotous behaviour . . . or by any obstruction to their proceedings."[143] The definition of contempt in the Maryland Constitution echoes the definition for modern criminal contempt but gave that power to legislature. This is especially noteworthy because the Maryland Constitution established a judiciary and noted how it was to be structured but made no mention of its powers to compel parties before it.[144]

In the years after the state's founding, the Maryland legislature passed a series of statutes granting Maryland courts the authority to hold individuals in contempt under certain limited circumstances.[145] The fact that the legislature believed that they needed to grant the courts a contempt power indicates that they did not believe the courts had any inherent contempt power. Additionally, the fact that the legislature mandated that the contempt power only be used in specific circumstances demonstrates that the legislature believed that any contempt powers were subject to legislative approval. Furthermore, despite the fact that the Maryland legislature delegated to the courts a limited contempt power, it appears that the courts did not have an opportunity to use it. The author's review of published Maryland caselaw between the years following independence and before the ratification of the U.S. Constitution, found no cases in which Maryland courts held a party in contempt.[146] The lack of contempt cases during that period becomes more significant when one considers that there are several cases from only a couple years prior to independence where the provincial court of Maryland *did* hold parties in contempt.[147]

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141. The state legislatures with explicit contempt powers could use those powers in a broad array of situations to punish conduct that obstructed their proceedings or affronted their dignity. *See generally* 1 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe ed., 1909) [hereinafter THORPE'S STATE CONSTITUTIONS]. *Cf.* 18 U.S.C. § 401.

142. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 187 (2001).

143. 3 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 1693 (Constitution of Maryland 1776).

144. *Id.* at 1703.

145. *Hanson's Laws of Maryland*, 203 ARCHIVES OF MD. 1, 180, 221, 223, 227, 318 (2018), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000203/html/index.html [https://perma.cc/9F55-MZ8R].

146. These records may be incomplete because court records from this time period are sparse.

147. *See, e.g.*, Christie v. Goldsborough, 1 H. & McH. 540, 540 (Md. 1774) (sheriff held in contempt for disobeying a court writ); Scott v. Watts, 1 H. & McH. 458, 458 (Md. 1772); West v. Stigar, 1 H. & McH. 247, 247 (Md. 1767). The first recorded case where a Maryland court held a party in

Individuals were unlikely to have suddenly stopped disobeying and disrespecting courts. The lack of contempt proceedings is noteworthy as the court must have had a good reason to stop holding individuals in contempt. One can infer that the decreased use of the contempt power was due to the fact that the courts were stripped of their pre-independence contempt authority and then legislatively delegated a much more limited power. That the Maryland constitution expressly provided the legislature with a power to punish for contempt without conferring a similar power on the judiciary, that any contempt power of the Maryland courts was circumscribed by the legislature, and that Maryland courts seem to have ceased holding parties in contempt after independence all lead to the conclusion that the Maryland public and government believed courts had no contempt power other than that granted by the legislature.

The 1780 Massachusetts Constitution also expressly vested the power to punish contempts in the legislative branch, stating that "[t]hey shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence."[148] The Massachusetts constitution also provided the same power to the governor but did not confer any power for judges to punish contempts, despite creating a judicial branch.[149] Similar to Maryland, published opinions from Massachusetts' courts during the revolutionary period do not indicate that the courts exercised any power to punish for contempt.[150] The Massachusetts Constitution also states that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property . . . but by the judgment of his peers, or the law of the land," further demonstrating that discretionary punishment by the judiciary was not contemplated.[151] "Law of the land" implies a law that applies to all citizens rather than one that is applied in a discretionary manner, such as when judges discretionarily punish contemptuous conduct.[152]

Similar to Maryland and Massachusetts, New Hampshire also vested a power to punish contempt outside of the judiciary in its pre-ratification state constitution.[153] New Hampshire is somewhat unique among the states in that it adopted two successive constitutions, the second of which was adopted only three years before the Constitutional Convention in Philadelphia drafted the

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contempt after independence was in 1792, five years after the Constitution was ratified. State v. Stone, 3 H. & McH. 115 (Md. 1792).

148. 3 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 1899 (Constitution of Massachusetts 1780).

149. *Id.* ("[T]he governor and council shall have the same authority to punish in like cases.").

150. Sources from this period are limited, but the lack of court cases in which judges held litigants in contempt during this period indicates that the courts lacked a common law contempt power independent of the Massachusetts constitution.

151. 3 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 1891 (Constitution of Massachusetts 1780).

152. *Id.*

153. 4 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 2462 (Constitution of New Hampshire 1784).

United States Constitution.[154] With regard to punishment for contempt, the New Hampshire's 1784 Constitution states the following:

> THE house of representatives . . . . shall have authority to punish by imprisonment, every person who shall be guilty of disrespect to the house in its presence, by any disorderly or contemptuous behaviour, or by threatening, or ill treating any of its members; or by obstructing its deliberations; every person guilty of a breach of its privileges in making arrests for debt, or by assaulting any member during his attendance at any session; in assaulting or disturbing any one of its officers in the execution of any order or procedure of the house, in assaulting any witness, or other person, ordered to attend by and during his attendance of the house, or in rescuing any person arrested by order of the house, knowing them to be such. The senate, president and council, shall have the same powers in like cases; provided that no imprisonment by either, for any offence, exceed ten days.[155]

The power to punish for contemptuous behavior in the 1784 New Hampshire Constitution is noteworthy because the conduct that it considers to be contempt is effectively the same as the conduct that courts during the colonial era and courts in the modern era considered contempt.[156] Thus, one can identify the power expressly vested here in the legislature and executive as the same power that courts across the country have since claimed for themselves.[157]

However, despite granting this power to the House of Representatives, and to a lesser extent to the Senate, President, and Council, the New Hampshire Constitution makes no mention of the New Hampshire Judiciary having any punishment power.[158] It would have been exceedingly simple to include the judiciary in the list of other actors that could punish for contemptuous behavior, but the New Hampshire Constitution did not do so. The clause was extremely specific in exactly who could punish for contempts and, under the New Hampshire Constitution, the power was clearly a legislative and executive one.[159] Therefore, we can infer by its absence (à la *expressio unius est exclusio alterius*) that the power to punish contempt was not thought of as a judicial power

154. *Id. See generally* DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 41 (2007) (describing the Philadelphia Convention).

155. 4 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 2462 (Constitution of New Hampshire 1784).

156. *Compare id.*, *with* 18 U.S.C. § 401 ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."), *and* Thwing v. Dennie, Quincy (Mass.) Rep. 338 (1772) (party held in contempt assaulted another attorney).

157. *See, e.g.*, United States v. Barnett, 376 U.S. 681, 700 (1964).

158. 4 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 2462 (Constitution of New Hampshire 1784).

159. *Id.*

in New Hampshire in the years leading up to the ratification of the United States Constitution.[160]

The Constitutions and records of several other states are also informative on the contempt power of the era, though to a lesser extent. South Carolina's 1778 Constitution does not mention any contempt power in either the legislature or the judiciary.[161] But South Carolina's 1790 Constitution, enacted only two years after the United States Constitution, explicitly vests the power to punish for contempt in the legislature.[162] Although not as persuasive as the pre-ratification constitutions, that language is still informative on how the Founders of the time thought the power to punish for contempt should be allocated.[163]

The Virginia Constitution also does not mention any contempt power.[164] But, records from the time show that the Virginia legislature, similar to the Maryland legislature, delegated a contempt power to the courts.[165] The fact that the legislature granted the courts a contempt power and set out specific proceedings for its use demonstrates that contempt was not inherent in the state's tribunals but had to be vested in them by an act of the legislature.[166] An early draft of the Virginia Constitution included a reference to a contempt power in judicial proceedings,[167] but that reference was ultimately dropped in the final version.[168] Therefore, Virginia legislative history during this period demonstrates that contempt was not an inherent judicial power but rather a legislatively delegated power.

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160. "*Expressio unius est exclusion alterius*" is a traditional canon of textual construction. *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019). There is evidence that it was used during this period in American history. *See, e.g.*, Pirate v. Dalby, 1 U.S. (1 Dall.) 167, 168 (1786) ("[T]he maxim which declares that expression unius, eft exclufio alterius, must be applied to the plaintiff's case . . . .").

161. *See* 6 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 3248–58 (Constitution of South Carolina 1778).

162. 6 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 3260 (Constitution of South Carolina1790).

163. Charles Pickney, who was governor of South Carolina when both the United States and South Carolina constitutions were ratified, was also an influential member of the Philadelphia Convention. Pickney presided over the ratifying convention in South Carolina. Pickney would have been well aware of the form of the United States government and endorsed that form of government. Pickney was also trained as a lawyer and would have been familiar with the intricacies of the legal process and the powers vested in the courts. *Charles Pickney*, ENCYC. BRITANNICA (Oct. 25, 2020), https://www.britannica.com/biography/Charles-Pinckney [https://perma.cc/2NPH-245T].

164. *See* 7 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 3813–19 (Constitution of Virginia 1776).

165. *See* 1 THE PAPERS OF THOMAS JEFFERSON, 1760–1776, at 610–20 (Julian P. Boyd ed., 1950) ("II. Bill for Establishing a High Court of Chancery [25 November 1776]"); 2 THE PAPERS OF THOMAS JEFFERSON, 1777 TO 18 JUNE 1779, at 155–67 (Julian P. Boyd ed., 1950) ("II. Bill for Settling Titles to Unpatented Lands [14 January 1778]"); *id.* at 592–99 ("101. A Bill for Regulating Proceedings in Courts of Equity").

166. *See generally* sources cited *supra* note 165.

167. 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 165, at 356–65 ("III. Third Draft by Jefferson, [before June 1776]").

168. *See* 7 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 3813–19 (Constitution of Virginia 1776).

Unlike most other revolutionary states, Connecticut did not create a new constitution until 1818, and up until that time its government was formed according to *The Fundamental Orders of Connecticut* (1638) and *The Charter of the Colony of Connecticut* (1662), both of which were adopted while the state was an English colony.[169] This may explain the fact that, unlike Maryland and Massachusetts, Connecticut courts exercised a contempt power after independence.[170] Whereas the constitutions of Maryland, Massachusetts, and New Hampshire reflected the fundamental change in judicial authority absent a connection to the King, the Connecticut government did not reallocate the powers of their judiciary, so the judges continued to act as they always had.[171] *The Charter of the Colony of Connecticut* established the authority of the judges of Connecticut pursuant to the King's order and therefore it would have made sense that the judges maintained all the traditional powers of English judges.[172] Connecticut was in the minority of states when the Constitution was drafted in that it did not enact a new constitution.

Pennsylvania courts at this time also recognized in themselves a power to punish contempts,[173] but they did so pursuant to a grant of power in the Pennsylvania Constitution. The Pennsylvania Constitution of 1776 stated the following: "The supreme court, and the several courts of common pleas of this commonwealth, shall, besides the powers *usually exercised by such courts*, have the powers of a court of chancery . . . and such other powers as may be found necessary by future general assemblies, not inconsistent with this constitution."[174] In 1776, "usually" would have meant colonial practice.[175] By enacting historic practice in their constitution, the Pennsylvania government granted their courts broad powers.[176] Aside from cases in the Connecticut and Pennsylvania state courts, it does not appear that any published state judgments referred to a positive power in the judiciary to hold litigants in contempt.[177]

169. *See* 1 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 536–57 (Connecticut Constitutions).

170. *See, e.g.*, Allen v. Broom, 2 Kirby 11, 11 (Conn. 1786) (person who carries off court documents should be held in contempt); Barker v. Wilford, 1 Kirby 232, 235 (Conn. 1787); *In re* Strong, 1 Kirby 345, 347 (Conn. 1787). Court records from this time period are limited.

171. *See* ADAMS, *supra* note 142, at 53; 3 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 1691–1703 (Constitution of Maryland 1776); *id.* at 1888–1922 (Constitution of Massachusetts 1780); 4 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 2453–70 (Constitution of New Hampshire 1784); 1 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 536–57 (Connecticut Constitutions).

172. 1 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 536–57 (Connecticut Constitutions).

173. *See* Mifflin v. Bingham, 1 U.S. (1 Dall.) 272, 274 (Pa. 1788); *see also* Letter from Thomas Jefferson to Thomas Lee Shippen, *in* 13 THE PAPERS OF THOMAS JEFFERSON, MARCH TO 7 OCTOBER 1788, at 642, 642–43 (Julian P. Boyd ed., 1956).

174. 5 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 3088 (Constitution of Pennsylvania 1776) (emphasis added).

175. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, EXPLAINED IN THEIR DIFFERENT MEANINGS (3d ed. 1768) (defining "usual" as what is customary).

176. *See* Pushaw, *supra* note 2, at 799–800, 799 n.335.

177. Case law from this period is sparse.

Although undoubtedly relevant, the practices of the Connecticut and Pennsylvania state courts are not dispositive of whether the Founders thought judges could punish for contempts when enacting the federal Constitution. The Maryland, Massachusetts, and New Hampshire Constitutions organized their respective state governments more similarly to the way the United States Constitution eventually structured the federal government.[178] Therefore, we can infer that those constitutions served as apposite examples for the Founders on how the separation of powers in the U.S. Constitution should be organized.

Similar to the federal Constitution, the Maryland Constitution sought to ensure that the "legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other."[179] Like the federal Constitution, the Maryland Constitution envisioned specific roles for each branch and specified the role of the judiciary.[180] The Pennsylvania constitution in contrast does not delineate their separation of powers the same way.[181] Although the Pennsylvania Constitution notes that courts should be established, the main separation of power division under the Pennsylvania Constitution is a duality between the legislative and executive branch.[182] Additionally, Pennsylvania judges were more accountable to the people since they were appointed for seven year terms and could be removed for "misbehaviour at any time by the general assembly."[183] And the separation of powers in the Pennsylvania Constitution was also controversial at the time of the founding.[184] Furthermore, unlike the Pennsylvania Constitution which explicitly adopts the broad powers of English courts, the federal courts under the U.S. Constitution are courts of limited jurisdiction.[185] The federal Constitution does not explicitly purport to delegate traditional English court powers to the federal judiciary.[186] The Connecticut Constitution could not serve as an example because Connecticut did not create a new constitution until many years after the ratification.[187] Therefore, the words "judicial Power" in the Constitution should be read in line with the practices of states like Maryland and Massachusetts, whose constitutions restructured their judicial departments with fewer powers.

178. *See* ADAMS, *supra* note 142, at 172.

179. 3 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 1687 (Constitution of Maryland 1776); *see also* THE FEDERALIST NO. 47 (James Madison) ("Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other.").

180. 3 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 1691–1703 (Constitution of Maryland 1776).

181. *See* 5 THORPE'S STATE CONSTITUTIONS, *supra* note 141, at 3081–92 (Constitution of Pennsylvania 1776).

182. *See id.*

183. *Id.* at 3088.

184. *See* ADAMS, *supra* note 142, at 172.

185. THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

186. *See* U.S. CONST. art. III.

187. *See* ADAMS, *supra* note 142, at 53.

The mistrust of courts and preference for vesting discretionary authority in the legislature rather than the judiciary can also be found in the broad structure of the state constitutions and government practice. State legislatures exercised significant control over the judiciary and limited judicial discretion during the revolutionary period.[188] Legislatures exercised so much control over the judiciary that the legislature itself sometimes pronounced judgments with regard to disputes between their constituents.[189] Additionally, in many of the newly independent colonies, judges sat at the pleasure of the legislature (much in the same way colonial judges sat at the pleasure of the King), and the legislature controlled judicial salaries.[190] To a large extent, judges were beholden to the legislature for the use of any of their judicial powers, just as they had been dependent on the King.[191]

Furthermore, at the time, many of the Founders believed judges should not exercise any discretion in the application of law.[192] In a letter from Thomas Jefferson to Edmund Pendleton, Jefferson stated that judges should act only as "machines'' applying the law and that judges should not have discretion to act eccentrically or whimsically.[193] Jefferson never expressly mentions an inherent ability of judges to punish for contempt, but one can infer from the statement that he would have taken a dim view of judges holding parties in contempt at their discretion. A judicial philosophy where judges act as mere machines applying the law at the behest of the legislature is incompatible with independent judicial authority to discretionarily imprison litigants for contempt. Although Jefferson's views on the adoption of the common law might have lost in the long run, as an influential member of society his views would have informed the other Founders.[194]

2. Contempt Under the Articles of Confederation

During the revolutionary period the national government was organized under the Articles of Confederation. Therefore, the Articles also provide useful background for determining the power of the federal judiciary in the post-revolutionary period. The government under the Articles of Confederation cannot be used as a direct comparator to the government under the Constitution because under the Articles there was no separation of powers. Instead, the Articles vested all of the powers of the federal government in the Congress of

188. WOOD, *supra* note 73, at 155–56.
189. *Id.*
190. *Id.* at 161.
191. *See id.* at 160–61.
192. *Id.* at 161, 301.
193. Letter from Thomas Jefferson to Edmund Pendleton, *in* 1 THE PAPERS OF THOMAS JEFFERSON, 1760–1776, at 503, 505–06 (Julian P. Boyd ed., 1950).
194. *See* JEFF BROADWATER, JEFFERSON, MADISON AND THE MAKING OF THE CONSTITUTION 157–58 (2019) (noting that, during the writing of the Constitution, people "solicited Jefferson's views, and he expressed himself in letters that circulated among his friends and admirers").

the Confederation.[195] Although the Constitution fundamentally changed the structure of government—and perhaps the powers of the judiciary—the differences and similarities between the Articles and the Constitution remain informative on what powers the Founders thought were inherent in the "judicial Power."

It was under the Articles of Confederation that a form of the federal judiciary was first established, albeit an extremely limited version.[196] Under the Articles of Confederation, the Congress of the Confederation created tribunals to address only specific situations, and there was no standing judiciary.[197] There do not seem to be any examples of tribunals punishing litigants for contempt.[198] The limited and sporadic nature of the tribunals under the Articles demonstrates the dependence of those tribunals on the Congress and thus lends credibility to the notion that the tribunals did not have inherent contempt powers.

Instead, it was the Articles of Confederation Congress that punished parties for contempt of its authority.[199] On June 12, 1777, the Congress of the Confederation made a motion where it "[r]esolved that it is the Right and the Duty of this Congress, to vindicate its own Authority from Contempts, And the Priviledges of all its Members."[200] But even though the Congress punished contempts of its authority, it only used those powers in its legislative, not judicial, function.[201] Thus, we can infer from the fact that the contempt power was exercised by the Congress of the Confederation, acting as a legislature, not as a court, that it was the legislature that had the power to punish contempts and that the contempt power was thought to be an inherent legislative power.

The legislature was the governmental body with the most authority during the revolutionary era.[202] And so, just as the contempt power was part of the King's prerogative as ultimate sovereign in the colonial era, we can infer that during the revolutionary era, the power to hold people in contempt for disrespect

195. *See* THE FEDERALIST NO. 38 (James Madison) ("Congress [under the Articles of Confederation], a single body of men, are the sole depositary of all the federal powers.").

196. *See* ARTICLES OF CONFEDERATION of 1781, art IX; *Saturday, January 15, 1780*, *in* 16 J. CONT'L CONG. 1774–1789, at 59, 61 (1910) (establishing a limited tribunal "for the trial of all appeals from the courts of admiralty in these United States, in cases of capture, to consist of three judges, appointed and commissioned by Congress").

197. *See* ARTICLES OF CONFEDERATION of 1781, art IX.

198. Case law from the time period is limited, but a diligent search did not uncover any examples of those courts using a contempt power. *See generally* J.C. Bancroft Davis, *Federal Courts Prior to the Adoption of the Constitution*, *in* 131 U.S. app., xix, xix–lxii (1889).

199. *See* 5 ELLIOT'S DEBATES, s*upra* note 78, at 10.

200. *Motion on Gunning Bedford*, *in* 5 PAPERS OF JOHN ADAMS 223, 224 (Robert J. Taylor ed., 1983).

201. *Id.* Although under Article IX of the Articles of Confederation the Congress had authority to set up limited tribunals, it did not do so when punishing the contempt of Gunning Bedford. Instead, the Congress punished for contempt in its usual session. Additionally, when it was proposed that the Congress of the Confederation create a court with contempt authority, the proposal did not gain enough votes to succeed. *See* Richard P. McCormick, *Ambiguous Authority: The Ordinances of the Confederation Congress*, 1781–1789, 41 AM. J. LEGAL HIST. 411, 423 (1997).

202. WOOD, *supra* note 73, at 409.

to the authority of the State rested ultimately with the legislature.[203] This view is consistent with later developments where state legislatures enacted statutes authorizing courts to hold parties in contempt.[204] By authorizing the courts to hold parties in contempt, the legislatures replaced the king as the source of the contempt power but granted the courts those powers they deemed necessary for efficient judicial function.[205]

C. Conceptions of the Contempt Power During Constitutional Formation and Ratification: Ratification Debates

Although the state legislatures were the ultimate source of political power in the revolutionary period, the years leading up to the ratification of the Constitution saw a marked change in political philosophy. Indeed, the allocation of governmental powers between the branches differed in the U.S. Constitution from that of the state practices and the Articles of Confederation. Tracing this evolution in the context of the contempt power, Part II.C.1 reviews *The Federalist* and *The Anti-Federalist*, and Part II.C.2 discusses the state ratification debates.

1. The Federalist *and* The Anti-Federalist

Both the *The Federalist* and *The Anti-Federalist* reveal what the Founders and ratifiers thought of the new system of government under the Constitution, and an analysis of each suggests that the Framers did not intend for the judiciary to have an inherent power of contempt.

a. The Federalist Nos. 48 and 78

The Constitution was established as a response to the unsatisfactory situation under the Articles of Confederation and the supremacy of individual states.[206] *The Federalist*, written by John Jay, James Madison, and Alexander Hamilton, are a good source for capturing the sentiments of the ratifiers of the Constitution.[207] *The Federalist* were specifically written to try to convince the public to accept the new constitution and thus serve as a guide to how the ratifiers were thinking about the meaning of the Constitution's provisions.[208] Additionally, because *The Federalist* were written in part by Alexander Hamilton and James Madison, who were both influential in authoring the

203. *See generally id.* (explaining the shift in attitude towards the legislature during the revolutionary era).

204. *See, e.g.*, *supra* note 145 and accompanying text.

205. *See* WOOD, *supra* note 73, at 160–61.

206. *See* THE FEDERALIST NO. 38 (James Madison).

207. *See Federalist Papers*, ENCYC. BRITANNICA (Jan. 26, 2020), https://www.britannica.com/topic/Federalist-papers [https://perma.cc/Y6TN-N85F].

208. *Id.*

Constitution,[209] their thoughts are especially relevant on the meaning of the text. From the text of *The Federalist*, it is possible to determine that the ratifiers intended to give the legislature and the executive a greater share of power than the judiciary even while protecting the latter's independence.

In *The Federalist No. 48*, James Madison cautioned against vesting too much power in the legislative branch since doing so could lead to tyranny just as easily as if the power were in the hands of a king.[210] *The Federalist No. 48* advocates for strong protections against encroachment by one branch on the powers of another branch.[211] Furthermore, in the years leading up to the Constitutional Convention, there was a backlash in the states due to the marginalization of the judicial role.[212] Legislative interference with individual adjudication created uncertainty in the law and undermined the legitimacy of the legislature.[213] As a result, many citizens at the time advocated for greater judicial independence.[214] In response to these concerns, the Philadelphia Convention decided that the Constitution should provide for judicial tenure during "good Behaviour" and a fixed judicial salary and vest the entire "judicial Power" in the federal courts.[215]

Although, as noted above, some courts have understood the phrase "the judicial Power of the United States" to encompass the traditional common law contempt power,[216] *The Federalist* caution otherwise. *The Federalist No. 48* provides initial clues as to the proper place of the contempt power in the allocation of federal powers. In the paper, Madison remarks that "[i]t is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."[217] Therefore, we can assume that if the contempt power was inherently vested in one branch of the government, it should not be vested in

209. *See* Alexander DeConde, *Alexander Hamilton*, ENCYC. BRITANNICA (Oct. 22, 2020), http://www.britannica.com/biography/Alexander-Hamilton-United-States-statesman [https://perma.cc/QPF8-BM2D]; *Presidents: James Madison*, THE WHITE HOUSE (2006), http://www.whitehouse.gov/about-the-white-house/presidents/james-madison/ [https://perma.cc/N22J-VH84] ("In later years, he was referred to as the 'Father of the Constitution.'").

210. THE FEDERALIST NO. 48 (James Madison) ("The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."); WOOD, *supra* note 73, at 407–08.

211. THE FEDERALIST NO. 48 (James Madison).

212. WOOD, *supra* note 73, at 455–56.

213. *Id.* at 454 ("'When the assembly leave the great business of the state, and take up private business, or interfere in disputes between contending parties,' men now increasingly argued, 'they are very liable to fall into mistakes, make wrong decisions, and so lose that respect which is due to them, as the Legislature of the State.' The evils of this legislative meddling were 'heightened when the society is divided among themselves; —one party praying the assembly for one thing, and the opposite party for another thing . . . . In such circumstances, the assembly ought not to interfere by any exertion of legislative power, but leave the contenting parties to apply to the proper tribunals for a decision of their differences.'").

214. *Id.* at 455–56.

215. U.S. CONST. art. III, § 1.

216. *See* Michaelson v. United States, 266 U.S. 42, 60, 65–66 (1924).

217. THE FEDERALIST NO. 48 (James Madison).

another branch.[218] The history of different states during this period demonstrates that the courts, the legislature, and the executive were thought by various constituencies to have the power to punish for contempt.[219] But *The Federalist* implies that it would be either the legislative or executive branches, but not both, that would exercise a contempt power.[220]

The best evidence that the Founders conceived of a judiciary without an inherent contempt power can be found in *The Federalist No. 78*. In *The Federalist No. 78*, Hamilton wrote that the judiciary "may truly be said to have neither FORCE nor WILL, but merely judgment."[221] The contempt power falls squarely into an action of force against the parties since the judge essentially mandates the party be fined or imprisoned.[222] Therefore, when a judge holds a party in contempt, especially in a summary proceeding, they are exercising force and demonstrating will.[223] When Hamilton contemplated judges protecting the people from unwise and unconstitutional legislation, he specifically wrote that the judiciary would "ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[224] That is to say, judges would be able to make decisions about whether a law was valid or not but could not enforce their judgment without the executive branch. If the power to hold parties in contempt and jail them is inherent in the judiciary, it implies a power in judges to enforce their judgments absent any other authority in contravention of how Founders like Hamilton conceived of the judiciary's place in the separation of powers.[225]

Even though *The Federalist No. 78* begins by contemplating that federal judges would have greater powers than judges had in the past, Hamilton envisioned mechanisms other than the contempt power would drive that increased role. He stated "[i]t is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their

218. *See* WOOD, *supra* note 73, at 450–52 (discussing the separation of powers).

219. *See supra* Part II.B.1. Also note that in the years following the Constitution both the legislature and the judiciary held parties in contempt but that the legislature held parties in contempt before the Supreme Court ever held that contempt was an inherent judicial power. *See* S. JOURNAL, 6th Cong., 1st Sess. 55–56 (1800); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

220. THE FEDERALIST NO. 78 (Alexander Hamilton).

221. *Id.*

222. *See Contempt*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable by fine or imprisonment.").

223. *Id.*; *Proceeding*, BLACK'S LAW DICTIONARY (11th ed. 2019) (Defining a summary proceeding as a "nonjury proceeding that settles a controversy or disposes of a case in a relatively prompt and simple manner"); *id.* (quoting A.H. MANCHESTER, MODERN LEGAL HISTORY OF ENGLAND AND WALES, 1750–1950, at 160 (1980) ("Summary proceedings were such as were directed by Act of Parliament, there was no jury, and the person accused was acquitted or sentenced only by such person as statute had appointed for his judge. The common law was wholly a stranger to summary proceedings.")).

224. THE FEDERALIST NO. 78 (Alexander Hamilton).

225. Both Hamilton and the Constitution make clear that it is the executive's, and not the judiciary's, role to "to take care that the laws be faithfully executed" and that the President is the branch with the powers most analogous to those of the King. THE FEDERALIST NO. 69 (Alexander Hamilton).

authority."[226] Hamilton's assertion that the judiciary is meant to protect the people from overreaching by the legislature implies that judges may have the power to control legislative action, which could be understood to implicate the contempt power. Additionally, Hamilton states that "all possible care is requisite to enable [the judiciary] to defend itself against" the other branches of government.[227] However, in *The Federalist No. 78*, when Hamilton refers to the courts as a bulwark against the legislature, he is referring to judicial review, the power of the courts to review laws when they are in conflict with the Constitution.[228] Furthermore, when writing about the need to provide the courts with a way of defending themselves against other branches of government, Hamilton refers specifically to tenure during good behavior[229] and a non-diminishing salary.[230] Hamilton's assertions therefore should not be read to imply the courts have a power to punish contempts. For Hamilton, judicial review, fixed salary, and life tenure are the scope of protections that the judiciary needs to protect themselves and the liberties guaranteed in the Constitution.

Other parts of *The Federalist No. 78* show that Hamilton thought the judiciary lacked an inherent contempt power. Hamilton regarded the judiciary as "the *weakest* of the three departments of power" and that the judiciary "can take *no active resolution* whatever."[231] It is difficult to imagine that Hamilton would assert that judges who were able to summarily imprison parties at their discretion are the weakest branch of government if federal judges indeed held power to punish contempts. Therefore, we can infer that the Federalists did not believe that such a vast power existed in judges. Moreover, *The Federalist No. 78* also undermines any assertion that the judiciary could use the contempt power against coordinate branches of government. Hamilton states that the judiciary "can never attack with success either of the other two" branches of government.[232]

The Federalist No. 48 further supports that the judiciary lacks an inherent contempt power because it would inappropriately be an "overruling influence" on the political branches; Madison stated that "[i]t is equally evident, that none of [the branches of government] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective

226. THE FEDERALIST NO. 78 (Alexander Hamilton).

227. *Id.*

228. *See id.* ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.").

229. *Id.* ("[T]hat as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.").

230. *See* THE FEDERALIST NO. 79 (Alexander Hamilton).

231. THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis added). Despite that statement, judges have historically held members of other branches of government in contempt. This demonstrates that current use of the contempt power is incompatible with Hamilton's conception of the judicial power. *See, e.g.*, United States v. Barnett, 376 U.S. 681, 681 (1964).

232. THE FEDERALIST NO. 78 (Alexander Hamilton).

powers."[233] Thus, the contempt power should not be used in a way that leads to an overruling influence over another branch.[234] Under this logic, it would have made more sense for the Founders to place the contempt power in the legislative branch, not the judicial branch. Coordinate branches, especially the executive, appear as parties in front of the courts, and history has demonstrated that the courts do rule in ways which "overrul[e]" the executive in the administration of its powers and thus implicitly threaten contempt.[235] As a matter of consistency and separation of powers, it is likely that the Founders would have placed the inherent contempt power in a branch where its exercise was limited with respect to the other branches (i.e., the legislature).

b. The Anti-Federalist

The Anti-Federalist also support the conclusion that the federal judiciary was not considered to have an inherent power to punish contempts. These papers provide additional insight into the Constitution's meaning during the ratification.[236] The Anti-Federalists were a group who sought to convince the public not to accept the Constitution.[237] One of the Anti-Federalists' fears in the new Constitution was that the courts would be given too much power.[238] Although the Anti-Federalists failed in their goal of rejecting the Constitution, their writings are still relevant in understanding what many in the public thought about the Constitution's provisions at the time. Because the Federalists and Anti-Federalists were so often at odds, when the two sets of papers agree on a provision's meaning or on what the allocation of powers would be under the Constitution, it is strong evidence that that meaning was generally accepted at the time.[239] *The Anti-Federalist* explicitly mention the power to punish contempts, but one can infer from their writings that even they seemed to acknowledge that courts were not the branch with authority to unilaterally and discretionarily punish contempts.

233. THE FEDERALIST NO. 48 (James Madison).

234. *See id.*

235. *See* United States v. Nixon, 418 U.S. 683, 713 (1974) (holding presidential privilege does not prevail over "the fundamental demands of due process of law in the fair administration of criminal justice"); *see also* Knight First Amend. Inst. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), *aff'd* 928 F.3d 226 (2d Cir. 2019), *vacated as moot sub nom.*; Biden v. Knight First Amend. Inst., 141 S. Ct. 1220 (2021); Saleh v. Bush, 848 F.3d 880 (9th Cir. 2017); Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020); Trump v. Vance, 140 S. Ct. 2412 (2020); Broder & Lewis, *supra* note 21.

236. *See* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 31–32 (2020); Akhil Reed Amar, *Anti-Federalists,* The Federalist Papers*, and the Big Argument for Union*, 16 HARV. J.L. & PUB. POL'Y, 111, 117 (1993) ("The arguments in these papers were accepted because both Anti-Federalists and Federalists could agree with them.").

237. *See Anti-Federalists*, ENCYC. BRITANNICA (Mar. 19, 2020), http://www.britannica.com/topic/Anti-Federalists [https://perma.cc/C598-JCXA].

238. *See* Essays of Brutus, *No. I*, N.Y. J. (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 363, 365 (Herbert J. Storing ed., 1981).

239. *See* Amar, *supra* note 236, at 117.

The chief fear of the Anti-Federalists was that an overly powerful Congress would subvert individual liberty.[240] Referring to the powers of Congress, the famous Anti-Federalist Brutus wrote that, like state legislatures,[241] Congress "has as absolute and perfect powers to . . . *declare offences, and annex penalties*, with respect to every object to which it extends, as any other in the world."[242] By so writing, Brutus warned the public against the accumulation of too much power in the legislature and that the legislature would have the power to punish them at will. Brutus wrote that "[t]he powers of the general legislature extend to every case that is of the least importance . . . . It has authority to make laws which will affect the lives, the liberty, and property of every man in the United States."[243] The fact that there was consensus among the Federalists[244] and Anti-Federalists[245] that it was the legislature, not judiciary, that had the power to assign punishment demonstrates how both sides of the political spectrum agreed that judges did not have an inherent punishing authority.[246]

By contrast, the main powers the Anti-Federalists feared from the judicial branch was its ability to review the constitutionality of duly enacted congressional and state statutes[247] and its finality in declaring what the Constitution and the laws required.[248] In describing his fears of the judicial branch, Brutus wrote:

> The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their *construction* or do it away. If, therefore, the legislature pass any laws, inconsistent with the

240. Essays of Brutus, *No. I*, *supra* note 238, at 365.

241. Brutus specifically refers to the Massachusetts government and, as explained above, Massachusetts was one state with a Constitution that explicitly vested a power to punish contempt in branches other than the judiciary. *Id.*

242. *Id.* (emphasis added).

243. *Id.*

244. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("FORCE nor WILL").

245. *See* Essays of Brutus, *No. I*, *supra* note 238, at 365.

246. *See Consider Arms, Malichi Maynard, and Samuel Field: Dissent to the Massachusetts Convention*, HAMPSHIRE GAZETTE (Apr. 9, 1788), https://www.consource.org/document/consider-arms-malachi-maynard-and-samuel-field-dissent-to-the-massachusetts-convention-1788-4-9/ [https://perma.cc/HC5Z-WUF4] ("We could not then, we still cannot see, that because people are many times guilty of crimes, and deserving of punishment, that it from thence follows [Congress] ought to have power to punish them when they are not guilty, or to punish the innocent with the guilty without discrimination, which amounts to the same thing. But this we think in fact to be the case as to this federal constitution."); Essays of Brutus. *No. II*, N.Y. J. (Nov. 1, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 238, at 372, 374 ("The powers vested in the new Congress extend in many cases to life; they are authorised to provide for the punishment of a variety of capital crimes . . . .").

247. *See* RICHARD HENRY LEE, *Letter III*, *in* OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION; AND TO SEVERAL ESSENTIAL AND NECESSARY ALTERATIONS IN IT 15, 25 (New York, Thomas Greenleaf 1787) ("There are some powers proposed to be lodged in the general government in the judicial department, I think very unnecessarily, I mean powers respecting questions arising upon the internal laws of the respective states.").

248. Essays of Brutus, *No. XV*, N.Y. J. (Mar. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 238, at 437, 440.

> sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature."[249]

Exemplified in the quote above, the Anti-Federalists primarily saw the role of the judiciary as one in which judges interpreted the Constitution and federal laws. The role of the courts was adjudication of disputes, not enforcement, the latter of which was left to the executive and legislative branches. There is no indication in their records that the Anti-Federalists ever even considered that courts had authority to unilaterally punish parties in front of them at the judge's discretion. We can therefore infer that the Anti-Federalists would have recognized that the branches that could possibly punish contempts were the legislature or executive, not the judiciary. The Anti-Federalists thought that with regard to the enforcement of law or punishment, the judiciary was only a vehicle giving effect to Congress's decisions and construing federal law. In terms of punishment, what the Anti-Federalists feared was that the courts would assist Congress in overstepping Congress's constitutional boundaries and allow *Congress* to punish for various actions.[250]

2. Ratification Debates in the States

Other vital sources on the meaning of the judicial power are the ratification debates in the state conventions. Although Founders like Hamilton and Madison wrote the Constitution, it was enacted through the actions of the state ratifying conventions. Therefore, the meaning the state ratifying conventions gave to the words is eminently important. This sub-Section reviews informative statements from Virginia and Connecticut, as the conventions in those states contain statements relevant to analyzing the contempt power.[251]

First, several informative statements can be found in the records of the debates in the Commonwealth of Virginia. Although Virginia was not necessary to the official ratification of the Constitution, since it was ratified without Virginia, several of the most influential founders, such as James Madison, Edmund Pendleton, and George Mason were present at the Virginia Convention.[252] In the days leading up to the ratification, Edmund Pendleton, the President of the Virginia Convention, made the following statement: "I mentioned the necessity of making a *judiciary* an essential part of the government. It is necessary, in order to arrest the executive arm, *prevent*

249. *Id.* (emphasis added).

250. *See* Montezuma, *A Consolidated Government Is a Tyranny*, INDEPENDENT GAZETTEER (Oct. 17, 1787), http://resources.utulsa.edu/law/classes/rice/Constitutional/AntiFederalist/09.htm [https://perma.cc/LYT3-LSQU]; Essays of Brutus, *No. I*, *supra* note 238, at 367 ("The powers given by this article are very general and comprehensive, and *it may receive a construction to justify the passing almost any law*." (emphasis added)).

251. Records from the state conventions are sparse.

252. *See* DAVID L. PULLIAM, THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME 36 (1901).

arbitrary punishments, and give a fair trial."[253] Echoing Hamilton's rhetoric, Pendleton contended that although the judiciary is necessary to serve as a check on the executive, its reason for doing so is to prevent arbitrary punishments and provide for fair trials.[254] Because punishing for contempt was a discretionary practice, often without trial, contempt is the very type of conduct that Pendleton thought the judiciary should be guarding against.[255] One can infer from Pendleton's statement that he did not believe that judges ought to exercise an inherent power to arbitrarily punish but rather the power to control the executive or legislature by preventing them from punishing. This was done in the Virginia courts under Pendleton during his tenure as the presiding judge when he declared conduct unconstitutional.[256] Pendleton, like Hamilton, believed that judicial review was the means by which courts should control the other branches.[257]

Pendleton's statement is authoritative for two reasons. First, Pendleton was so well respected at the time that the other delegates voted unanimously to appoint him as president of the Virginia ratifying convention.[258] The fact that he was appointed unanimously gives some indication that his views were highly respected by the other members of the convention. Second, Pendleton served as the presiding judge of the Court of Chancery established after independence, and when Virginia established a Supreme Court in 1778, Pendleton was its first president.[259] Therefore, if any member of the delegation had an understanding of what the judicial power did and should entail, it would be Pendleton. Furthermore, his stature and influence as a judge likely shaped the way the Virginia bar, many of whom were present for the convention, understood judicial power.[260] Members of the Virginia ratifying convention, such as future Supreme Court Justice John Marshall, practiced in front of Pendleton and would therefore have been influenced by how he behaved as a judge.[261] Aside from John Marshall, John Blair, one of the judges who sat with Pendleton on the Virginia Supreme Court, would also later go on to become a Justice on the United States Supreme Court.[262]

When looking at additional conversations in the Virginia convention between George Mason, Edmund Pendleton, and James Madison, it is clear that the power that was contemplated for the judiciary, and feared by the influential

253. 3 ELLIOT'S DEBATES, *supra* note 78, at 517 (emphasis added).
254. *Id.*
255. *See supra* Part II.A.
256. W. Hamilton Bryson, *Edmund Pendleton (1721–1803)*, *in* 2 GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 602, 604–05 (John R. Vile ed., 2003).
257. *Id.* at 605.
258. 6 GEORGE BANCROFT, HISTORY OF THE UNITED STATES OF AMERICA, FROM THE DISCOVERY OF THE CONTINENT 426 (New York, D. Appleton & Co. 1888).
259. Bryson, *supra* note 256, at 604.
260. *Id.*
261. *Id.*; 2 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 18 (1916).
262. Bryson, *supra* note 256, at 604.

Anti-Federalist George Mason,[263] was the power of adjudication and appellate review, not punishment.[264] Looking at Mason's argument, he feared adjudication by federal judges, not any inherent power to punish.[265] When referring to judicial powers during the convention, Pendleton also specifically noted that essentially all of the powers in the lower federal courts are regulatable by Congress, demonstrating Congress's superior power.[266]

Subsequent statements from the Virginia debates further support a conclusion that the judiciary lacked the contempt power. For example, Patrick Henry, another delegate to the Virginia convention, stated the following: "It would ease my mind, if the honorable gentleman would tell me the manner in which money should be paid, if, in a suit between a state and individuals, the state were cast. The honorable gentleman, perhaps, does not mean to use coercion, but some gentle caution."[267] His statement was a response to James Madison's defense of the federal judiciary and its power to adjudicate claims between states and individuals.[268] In making the statement, Henry characterized Madison's view of the federal judiciary as able to enforce debt judgments against states by declaring a judgment rather than through judicial coercion (e.g. punishment), thereby indicating that Founders like Madison did not believe judges had inherent power to punish non-compliance.[269] Further supporting this belief, John Marshall, then a delegate to that convention, also queried: "What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or *availing yourselves of force*?"[270] His statement indicates that in enforcing their judgments, the federal courts were not intended to use force, like punishing for contempt, but rather to enforce their judgment by declaration.

Additionally, statements made at the Connecticut convention also support the conclusion that the federal courts were not intended to have an inherent contempt power. During the Connecticut debate, the Federalist Oliver Ellsworth, a state judge and future Chief Justice of the Supreme Court, stated the proper role of the judiciary in the following way:

> This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made

263. *See* JEFF BROADWATER, GEORGE MASON, FORGOTTEN FOUNDER 200 (2009). George Mason also wrote the first draft of the 1776 Virginia constitution. ADAMS, *supra* note 142, at 56.
264. *See* 3 ELLIOT'S DEBATES, *supra* note 78, at 518–26, 534, 538.
265. *Id.*
266. *Id.* at 518–21.
267. *Id.* at 542.
268. *Id.* at 541–42.
269. *Id.*
270. *Id.* at 554 (emphasis added).

> independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so."[271]

Ellsworth stated what the role of judges was and what the "judicial Power" meant: the role and power of the federal judges was to determine what the law was and apply it, not to discretionarily mete out punishments.[272] During these same remarks, Ellsworth noted that the coercive powers of the government are vested in Congress.[273] Ellsworth's remarks were made in defense of placing all of the coercive power, both the "sword" and the "purse" in Congress rather than in other governmental bodies.[274] Ellsworth recognized the need to "show that a power in the general government to enforce the decrees of the Union is absolutely necessary."[275] But, his remarks clarified that that power is one dependent on congressional authority.[276] Ellsworth made a distinction between coercion through declaration of law and coercion through use of force and stated that the Constitution provides for the former.[277] Ellsworth's statements are important in the inquiry on the meaning of the judicial power because he was a member of the Federalist party, was present at the Philadelphia Convention, and was one of the proponents of the Constitution.[278] Furthermore, as a judge, he would have understood what the federal judiciary required and what their powers should be. Lastly, as one of the first two U.S. senators for Connecticut, he authored and helped pass the Federal Judiciary Act of 1789, which bears directly on the judicial contempt power.[279]

Taken together, the papers of the Federalists, the Anti-Federalists, and the notes of the various state conventions demonstrate that the people who wrote and informed Article III believed that judicial power referred to power of adjudication. The federal judiciary clearly had the power to adjudicate claims between parties. Those sources also indicate that the federal judiciary as a branch did not have the power to punish or force other branches or individuals. Therefore, the Founders and ratifiers of the Constitution did not intend to vest the federal judiciary with an inherent contempt power.

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271. 2 ELLIOT'S DEBATES, *supra* note 78, at 196.
272. *Id.*
273. *Id.*
274. *Id.* at 190–97.
275. *Id.* at 190.
276. *See id.*
277. *Id.* at 197.
278. William R. Casto & John F. Kennedy, *Oliver Ellsworth*, ENCYC. BRITANNICA (Apr. 25, 2021), http://www.britannica.com/biography/Oliver-Ellsworth [https://perma.cc/B39N-23TA]. It has been asserted that Ellsworth, along with five others, drafted the structure of government laid out in the Constitution. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 397 (Max Farrand ed., 1911).
279. WILLIAM GARROTT BROWN, THE LIFE OF OLIVER ELLSWORTH 196–98 (1905).

D. Conceptions of the Contempt Power Post-Ratification: Early Congress, Courts, and President

Although events and statements that took place post-ratification could not inform the debates in the ratifying states or convention, the events are informative of how individuals who had been present during the drafting and ratification thought of the judicial power. One may assume that early governmental actors conformed their actions to their beliefs about what powers the Constitution granted the various branches of government. Accordingly, those events serve as a helpful guide to further clarify whether judges had an inherent contempt power. In Part II.D, I review (1) early congressional actions, (2) executive branch understanding, (3) post-ratification state understanding, and (4) early Supreme Court cases to reveal the original public meaning of the judicial powers at the time of ratification.

1. Early Congressional Actions

An important source of the judiciary's contempt power was the Federal Judiciary Act of 1789. The Act is relevant for two reasons. First, it explicitly vests the federal judiciary with the power to hold parties in contempt.[280] Second, it establishes the United States Marshal service to act at the direction of the Courts to enforce court orders.[281] The fact that the Act confers a power to punish contempts on the federal courts is noteworthy because if the first Congress thought that federal courts had an inherent power to punish for contempt, it would have been unnecessary to confer the same power on them again. Indeed, Congress could simply have established inferior courts pursuant to Article III and they automatically would have had the power to hold parties in contempt. In other words, conferring the power to punish would be redundant if the power already existed.

One could argue that Congress merely enacted the Judiciary Act to clarify the powers already inherent in the courts, but that is unlikely. Congress itself exercised an inherent authority to punish contempts with no statutory basis until 1857, and the courts recognized this as Congress's inherent contempt authority.[282] Thus, if Congress thought it was necessary to clarify powers that

280. An Act to Establish the Judicial Courts of the United States, ch. 20, § 17, 1 Stat. 73, 83 (1789) ("And be it further enacted, That all the said courts of the United States shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same.").

281. Although the Marshal service is now organized under the Justice Department, 28 U.S.C. § 566 still vests the judiciary with the power to direct the Marshals: "It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts." 28 U.S.C. § 566. *See also* Emile J. Katz, Grand Unified (Separation of Powers) Theory: Examining the United States Marshals (June 30, 2021) (unpublished manuscript) (on file with author) (discussing the establishment and constitutionality of the US Marshal Service with a focus on separation of powers concerns).

282. Goldfarb, *supra* note 3, at 27; S. JOURNAL, 6th Cong., 1st Sess. 60 (1800) ("'WM. DUANE.' is guilty of a contempt of said order, and of this House, and that, for said contempt, he, the said Wm.

the branches inherently exercised, they would likely have enacted a statute clarifying their own contempt power as well. Furthermore, as Madison noted in *The Federalist No. 48*, the powers of one branch are exclusive of other branches, so if early Congress members exercised a contempt power, it would not have made sense for the judiciary to also exercise an inherent contempt power, especially since Congress punished for contempts before the judiciary ever addressed the issue.[283] Therefore, it is unlikely that members of the early Congress thought the courts had an inherent power to punish contempts.

The views of members of the early Congress are important because many of those members were also constitutional Founders. The 1789 Judiciary Act provides a reflection of what the authors of the Constitution thought about the judiciary because the Act was authored by Oliver Ellsworth, who was one of the main drafters of the judiciary section of the Constitution.[284] If Ellsworth believed the judiciary section of the Constitution had conferred an inherent power in the judiciary to punish for contempt, he would have seen no reason to have Congress also grant them that power.

2. Early Executive Branch Understanding

There is evidence that members of the executive branch believed that punishing contempts was a power of Congress. In 1789, Henry Knox, then Secretary of War, wrote to President Washington and informed him that the treaties made by Congress were not being upheld and that Congress should consider taking some action to punish those contempts of the authority of the United States.[285] And in 1807, the Sixth Attorney General of the United States, Caesar Augustus Rodney, wrote a memo about the ability of the federal courts to punish for contempts in which he effectively stated that the power was limited to those which the Congress had delegated to them through the Federal Judiciary Acts of 1789 and 1793.[286] This further demonstrates that the courts had no

Duane, be taken into the custody of the Sergeant-at-Arms attending this House, to be kept subject to the further orders of the Senate."); H.R. JOURNAL, 4th Cong., 1st Sess. 390(1795) ("[S]ufficient evidence of a contempt to, and breach of the privileges of, this House, in an unwarrantable attempt to corrupt the integrity of its members."); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821) (holding that Congress has an inherent contempt authority to punish nonmembers as well as members).

283. *See* Letter to George Washington from Robert Randall, *in* 19 THE PAPERS OF GEORGE WASHINGTON, 360, 361–62 (David R. Hoth ed., 2016); *From John Adams to John Quincy Adams*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/99-03-02-1624 [https://perma.cc/2QQF-6M44]; THE FEDERALIST NO. 48 (James Madison).

284. *See* BROWN, *supra* note 279, at 196–98. It has been asserted that Ellsworth, along with five others, drafted the structure of government laid out in the Constitution. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 278, at 397.

285. *See* Letter to George Washington from Henry Knox, *in* 3 THE PAPERS OF GEORGE WASHINGTON 134, 137 (Dorothy Twohig ed.,1989).

286. *See To Thomas Jefferson from Caesar Augustus Rodney*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/99-01-02-6385 [https://perma.cc/8FPU-J3JC]. It is noteworthy that Caesar Augustus Rodney also questioned the historical practice of attachments or contempts in British judicial history as a relatively new phenomenon. This provides additional support for the earlier assertion that British courts had begun to use the contempt power in a new way that did

inherent power to punish contempts other than those powers derived from the Congress. And so, it is evident that members of the executive branch thought the legislature, not the courts, was the governmental authority with inherent power to punish contempts.

The opinion that federal courts should not be able to compel parties by using the threat of contempt was also shared by at least one early president. Thomas Jefferson, who served first as Secretary of State under Washington, as Vice President under Adams, and then finally as president in his own right, expressed a view that the courts could not order the executive branch to comply with their instructions.[287] Although he did not use the word contempt, President Jefferson expressed the view that, despite the Judiciary Act of 1789, courts should not be able to punish a president for violating court orders.[288] Jefferson based his argument on the need for the executive to be independent of the courts.[289] In an 1807 letter between then President Jefferson and George Hay, Jefferson said the following: "[W]ould the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & *to imprisonment for disobedience* . . . ?"[290] Therefore, at the very least, Jefferson conceived of the contempt power as one that fell short of being applicable to the president. But the implications of Jefferson's statement reach beyond the President. The Constitution states that the judicial power extends to controversies in which the United States (and by implication, the president) is a party.[291] If one conceives of the power to punish as part of the greater judicial power, one must concede that the judicial branch could hold the executive in contempt. However, because Jefferson denied the judiciary such power, he effectively contended that the power to punish is not an inherent part of the judicial power described in Article III.

Jefferson did not deny that the legislative branch had a power to punish for contempt. During his tenure as Vice President and President of the Senate, Jefferson held one editor-printer in contempt of the Senate.[292] Thus, it is possible to infer that although Jefferson likely did not believe in an inherent judicial authority to punish contempts, he did believe in an inherent legislative authority to do so.

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not reflect historical practice and did not align with the way the founders would have thought about contempt. *See List of Batture-Related Papers Sent to Thomas Jefferson*, *in* 2 THE PAPERS OF THOMAS JEFFERSON RETIREMENT SERIES 439, 444 (J. Jefferson Looney ed., Princeton Univ. Press 2005) (1807) ("[T]he doctrine of contempt of court has been extended further than law or precedent would warrant.").

287. Letters from Thomas Jefferson to George Hay, *in* 10 THE WORKS OF THOMAS JEFFERSON 394, 404 (Paul Leicester Ford ed., 1905).

288. *Id.*

289. *Id.*

290. *Id.* (emphasis added).

291. U.S. CONST. art. III.

292. *See* Letter to Thomas Jefferson from William Duane, *in* 31 THE PAPERS OF THOMAS JEFFERSON 466, 466 (Barbara B. Oberg ed., Princeton Univ. Press 2004) (1800).

Lastly, although he only became President in 1809, James Madison's views on the contempt power are informative. James Madison's report on the Virginia Resolution, which, challenged the constitutionality of the Alien and Sedition Act, specifically questions the use of broad judicial discretion. In the report, Madison wrote:

> A discretion of this sort has always been lamented as incongruous and dangerous, even in the colonial and state courts, although so much narrowed by positive provisions in the local codes on all the principal subjects embraced by the common law . . . . [I]t is manifest that the power of the judges over the law would, in fact, erect them into legislators.[293]

Although the report on the Virginia Resolution was only written in 1798, several years after the Constitution was ratified and before Madison was president, it is noteworthy that Madison, one of the most important Founders in terms of writing and ratifying the Constitution and eventual president, noted that judges were not meant to have broad discretion.[294] Madison wrote the Virginia Resolution itself as a response to what he considered incorrect constitutional interpretation.[295]

3. Post-Ratification State Understanding

Many states thought that their state judges did not have an inherent power to punish for contempts in the years following the ratification. In his dissenting opinion in *Green v. U.S.*, Justice Black expounds on some of the early post-Constitution history of contempt. He wrote that in 1804, justices of the "Pennsylvania Supreme Court were actually impeached for sentencing a person to jail for contempt . . . . While the Justices were narrowly acquitted this apparently only aggravated popular antagonism toward the contempt power."[296] If the contempt power was inherent in the judiciary, it would have been odd for the state of Pennsylvania to impeach justices for using such power. State judges, especially in Pennsylvania, have also long been thought to exercise far more common law power than the federal courts[297] of more limited jurisdiction. The fact that the use of the contempt power by state law judges was contested casts doubt on whether that power was thought to have existed at all in federal judges. As noted earlier, Article III, section 1 of the Constitution suggests that Congress

293. 4 ELLIOT'S DEBATES, *supra* note 78, at 566.

294. *Id.*

295. *See Virginia Resolutions*, *in* 17 THE PAPERS OF JAMES MADISON185, 185–91 (David B. Mattern, J. C. A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991).

296. Green v. United States, 356 U.S. 165, 213 n.29 (1958) (Black, J., dissenting).

297. Under the Judiciary Act of 1789, Congress granted federal district courts only limited jurisdiction. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789). State courts were long the main forum for disputes absent diversity jurisdiction. FALLON, JR. ET AL., *supra* note 37, at 779–81 ("[A]bsent diversity jurisdiction, private litigants in the antebellum period generally had to look to the state courts in the first instance for the vindication of federal claims, subject to limited review by the Supreme Court . . . . Until the second half of the nineteenth century, Congress made no important additions to the original jurisdiction of the federal courts.").

may have chosen not to establish lower federal courts. In fact, some members of Congress specifically argued that the state courts were sufficient, and that inferior federal courts should not be established.[298] That implies that all necessary powers of the court system existed in the state courts. Thus, if there were questions about the power of state courts to hold individuals in contempt, those doubts should apply equally to the federal courts, if not more so.

4. Early Supreme Court Cases

The first Supreme Court case in which the Court addressed whether the judiciary has an inherent power to punish contempts was decided more than two decades after the Constitution was ratified.[299] *Hudson* was decided after misconceptions about the historical underpinnings of the contempt power had begun to proliferate in England and in the U.S. through the publication of the English Chief Justice Wilmot's notes.[300] Because the erroneous dicta and history contained in *Almon* began to burgeon in the years between the Constitution's ratification and the *Hudson* decision, it is likely that the Supreme Court at the time misunderstood how the power to punish for contempt was historically tied to the English executive and mistakenly assumed that there was an independent judicial branch with its own powers.[301] Furthermore, it may be noteworthy that Justice Johnson authored the majority opinion in *Hudson*.[302] Justice Johnson was the first justice on the Court who was not a member of the Federalist party,[303] and his views on the judicial power likely did not reflect the views of those in the Federalist party who were the initial proponents of the Constitution.[304] Those misunderstandings, and a focus on inapposite sources, entrenched the idea of an inherent judicial power to punish contempt where one most likely did not exist during the years the Founders wrote and ratified the Constitution.[305] This early misunderstanding of the history of the contempt power and the contempt power's connection to the executive and law-making authorities set the stage for a judicial usurpation of the contempt power. Ever since these early cases, courts have erroneously held that the judiciary is free to exercise an inherent power to punish contempts even though the evidence suggests that the Founders would not have thought so.[306]

298. 1 ANNALS OF CONG. 813 (Joseph Gales ed., 1790) ("Mr. Tucker was . . . against dividing the United States into districts for the purpose of instituting inferior Federal courts. He said the state courts were fully competent to the purposes for which those courts were to be created.").

299. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 32 (1812).

300. *Id.*; *see supra* Part I.B.

301. *See supra* Part I.B.

302. *See Hudson*, 11 U.S. at 32.

303. *See* Irwin F. Greenberg, *Justice William Johnson: South Carolina Unionist, 1823–1830*, 36 PA. HIST.: J. MID-ATLANTIC STUD. 307, 307 (1969).

304. Justice Johnson often disagreed with other members of the Court and was thus given the epithet "the first dissenter." *Id.*

305. *See supra* Part II.

306. *See supra* Part II.

CONCLUSION

The historical record from the years leading up to the framing of the Constitution provides mixed evidence with regard to the extent of the judicial power. Different states had different practices and different Founders had different conceptions of the powers that judges should wield. However, based on the contemporaneous overwhelming impetus to limit judicial discretion and the then-prevailing practices and political ideology, there is strong reason to believe that the Founders did not intend for the judiciary to wield the power to punish contempts that judges exercise today as an inherent power. This Note does not seek to make any normative judgments on the advisability of the judicial power to punish contempt—it only seeks to illuminate how the Founders did not intend to vest the Judiciary with an inherent constitutional power to sanction with contempt. Evidence from the founding demonstrates there is no inherent judicial contempt power in the federal judiciary, and that if Congress so desired it could limit or eliminate the power altogether without infringing on the separation of powers and the grant of power to the judiciary in Article III. This remains relevant today because despite the minimal limits placed on the judiciary by Congress, judges still exercise broad discretion in defining and punishing contempts and sometimes do so in ways which seem to infringe on due process rights and the equal protection of law. Congress may wish to assess whether to place further limits on the exercise of the judicial contempt power.[307]

307. Although the focus of this Note is on the judiciary, because the power to punish contempts likely belongs to Congress as an inherent constitutional power, Congress should be free to use the power to punish contempts at its complete discretion. As noted above, Congress has historically held individuals in contempt. That power may be useful to Congress when members of other branches of government fail to comply with congressional subpoenas (a recent example can be found in the actions of certain officers of the executive branch who refused to testify in front of the House of Representatives).

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I am a third-year student a St. John's University School of Law and a Staff Member on the *New York International Law Review*. I am writing to express my interest in a clerkship in your chambers for the 2022-2023 term.

My motivation for applying for this position is rooted in my deep commitment to public service and informed by my experience as an educator. Before law school, I was a tenured Secondary Education teacher at John Dewey High School, a low-income school in Brooklyn. As a former educator, not only am I adaptable to quickly changing circumstances, but I have developed the ability to communicate complex concepts in both written and oral formats.

As a Staff Member for the *New York International Law Review*, I researched, and edited articles focused on various international issues submitted for publication. My previous work with A.F.C. and St. John's Immigration clinic provided me with copious chances to engage in front-facing work with clients. I have interviewed asylum seekers, written asylee affidavits, and legal requests for compensatory educational services for students with special needs. As an Honors intern for the Department of Justice, I drafted portions of two appellate briefs, which allowed me to develop further as an efficient legal researcher and effective writer.

As the youngest of five daughters and the first in my family to attend law school, I have crafted a level of self-awareness and empathy. As a future advocate, I know I have an obligation to move the law forward positively and constructively. I see this position as an opportunity to capitalize on my established skills and learn new ones along the way. I believe my experiences inside and outside the classroom have prepared me to contribute meaningfully to your chambers.

Thank you for considering my application.

Sincerely,

Tatehona Kelly

TATEHONA KELLY

570 WESTMINSTER RD., APT #E4, BROOKLYN, NY, 11230 | 202-421-4586 | TATEHONAK@GMAIL.COM

EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Candidate for J.D., May 2022
Honors & Activities:

- *Staff Member*, New York International Law Review
- *Director of Spring Break Pro Bono Activities,* Public Interest Law Student Association
- *Member,* Black Law Students Association
- St. John's University School of Law Alumni Scholarship
- The New York City Bar Association's C. Bainbridge Smith Scholarship

FORDHAM UNIVERSITY, New York, NY
Masters in Adolescence Social Studies (M.S.T)., *summa cum laude*, August 2017

AMERICAN UNIVERSITY, Washington, D.C.
B.A. in History; Minor in Public Administration and Policy, May 2015
Honors: The Hurston/Wright Award for College Writers

PROFESSIONAL EXPERIENCE

APPLE BANK, New York, New York
Legal Extern, January 2022—April 2022

DEUTSCHE BANK (DB), New York, New York
Corporate Bank Legal Extern, September 2021—December 2021

- Reviewed, revised, and provided comments to non-disclosure agreements, parent guarantees, and receivable purchase agreements.
- Drafted Assignment and Assumption Agreements to reflect the transfer of letters of credit from a parent entity to a subsidiary.

OFFICE OF IMMIGRATION LITIGATION, DEPARTMENT OF JUSTICE, New York, NY
DOJ Honors Legal Intern, June 2021—August 2021

- Researched federal law relating to res judicata claims and drafted portions of appellee brief in the Eleventh Circuit.
- Drafted portions of appellee brief relating to a habeas corpus petition in the Ninth Circuit.
- Assessed firm and organization billing hours to help determine reasonableness and proper disbursement of fees under the Equal Access to Justice Act.

REFUGEE & IMMIGRANT RIGHTS CLINIC, ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Clinic Intern, August 2020—May 2021

- Conducted initial client interviews and drafted the resulting affidavits for the asylum seekers.
- Researched and analyzed country conditions relating to financial, socio-economic, and legal factors to determine client's eligibility for seeking asylum in the U.S.
- Assisted asylees in completing the Temporary Protected Status (TPS) application from the Department of Homeland Security, which provides work permits and stays of deportation for certain foreign nationals.

ADVOCATES FOR CHILDREN (A.F.C.), New York, NY
Legal Intern, May 2020—July 2020

- Participated in Individualized Education Program meetings and made oral presentations to facilitate clients' receiving necessary services.
- Examined client documents and, using them, drafted Impartial Hearing Requests seeking compensatory services due to denial of Free Appropriate Public Education.
- Researched and analyzed recent legal judgments relating to homeless students' education claims and presented key trends to internal leadership.

JOHN DEWEY HIGH SCHOOL, Brooklyn, NY
Secondary School Teacher (Grades 9-12), Social Studies, September 2015—September 2019.

- Coached the Mock Trial team and served as advisor to the Women of Color Alliance.
- Awarded faculty tenure in 2019, Superintendent's Certificate of Recognition: *Exceptional Educational Leader* in June 2018, and the edTPA, a Teacher Performance Assessment Portfolio Certificate in 2018.

TEACH FOR AMERICA (TFA), New York, NY
Corps Member, September 2015—May 2017

- Taught summer school program for low-income students (ages 13-17) in Philadelphia.

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ST. JOHN'S UNIVERSITY
SCHOOL OF LAW

SSN:*****9690 Student No:X03555078 Date Issued:17-JAN-2022

Record of: Tatehona Kelly

Current Name: Tatehona Kelly

Issued To: Tatehona Kelly

Course Level: Professional-Law

Current Program

College: School of Law

Subj	No.	Course Title	Cred	Grade	Pts	R
INSTITUTION CREDIT:						
Fall 2019						
BUSI	1090	CONTRACTS I	3.00	B+	9.90	
CIVL	1000	CIVIL PROCEDURE	4.00	B+	13.20	
CONL	1040	CONSTITUTIONAL LAW I	2.00	A-	7.40	
LGMT	1000	INTRODUCTION TO LAW	2.00	P	0.00	
LGMT	2040	PROFESSIONAL DEVELOPMENT	0.00	P	0.00	
LRWR	1030	LEGAL WRITING I	2.00	B	6.00	
TORT	1040	TORTS	4.00	B	12.00	

Earned Hrs	GPA-Hrs	QPts	GPA
17.00	15.00	48.50	3.23

Spring 2020

ALSK	2075	LAWYERING	2.00	B-	5.40	
BUSI	2000	CONTRACTS II	2.00	CR	0.00	
CONL	1050	CONSTITUTIONAL LAW II	3.00	CR	0.00	
CRIM	1010	CRIMINAL LAW	3.00	CR	0.00	
LGMT	2041	PROFESSIONAL DEVELOPMENT	0.00	CR	0.00	
LRWR	1010	LEGAL WRITING II	2.00	CR	0.00	
PROP	1080	PROPERTY	4.00	CR	0.00	

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	2.00	5.40	2.70

Fall 2020

Subj	No.	Course Title	Cred	Grade	Pts	R
INSTITUTION CREDIT:						
ADGV	1000	ADMINISTRATIVE LAW	3.00	B-	8.10	
ALSK	5000	REFUGEE IMMIG RT LIT CLIN PT1	4.00	A	16.00	
ALSK	8050	INTL & FOREIGN LEGAL RESEARCH	2.00	B+	6.60	
INTL	1040	INTERNATIONAL LAW	3.00	A-	11.10	
LETH	1000	PROFESSIONAL RESPONSIBILITY	3.00	B+	9.90	

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	15.00	51.70	3.45

Spring 2021

ALSK	5020	REFUGEE IMMIG RTS LIT CLIN-PT2	4.00	A	16.00	
BUSI	4060	BUSINESS BASICS	1.00	B	3.00	
INTL	1020	INTL BUSINESS TRANSACTIONS	3.00	B	9.00	
INTL	5040	INTL SCHOLARLY RESEARCH & WRTG	2.00	A-	7.40	
SFPR	2090	EVIDENCE	4.00	B	12.00	

Earned Hrs	GPA-Hrs	QPts	GPA
14.00	14.00	47.40	3.39

Fall 2021

ALSK	2015	EXTERNSHIP PLACEMENT	2.00	P	0.00	
ALSK	2025	EXTERNSHIP SEMINAR	2.00	A-	7.40	
ALSK	6060	MEDIATION:REPRESENTING CLIENTS	3.00	B	9.00	
BUSI	3000	BUSINESS ORGANIZATIONS	4.00	B-	10.80	
INTL	2050	TRANSACTIONS EMERGING MARKETS	2.00	B	6.00	

Earned Hrs	GPA-Hrs	QPts	GPA
13.00	11.00	33.20	3.02

Spring 2022

ALSK	2015	EXTERNSHIP PLACEMENT	2.00	In Progress	Course
ALSK	2035	EXTERNSHIP SEMINAR - ADVANCED	1.00	In Progress	Course
ALSK	3065	LYNCHING:LEGL DR RESP VIOLENCE	2.00	In Progress	Course
ALSK	8000	DRAFTING: CONTRACTS	2.00	In Progress	Course
ESTA	1040	TRUSTS AND ESTATES	4.00	In Progress	Course
INTL	4050	COMP LEGL SYSTEMS: LONDON	1.00	In Progress	Course

Ann M. Hurt
Law School Registrar

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ST. JOHN'S UNIVERSITY
SCHOOL OF LAW

SSN:*****9690 Student No:X03555078 Date Issued:17-JAN-2022

Record of: Tatehona Kelly

Subj	No.	Course Title	Cred	Grade	Pts	R
INSTITUTION CREDIT:						
THEO	1040	LAW AND LITERATURE	2.00	In Progress	Course	

Transcript Totals	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	75.00	57.00	186.20	3.27
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	75.00	57.00	186.20	3.27

----------END OF TRANSCRIPT----------

Page 2 of 2

Ann M. Hurt
Law School Registrar

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SCHOOL OF LAW

Office of the Registrar

GRADING SYSTEM

Class of 1998 to Present

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0.0
B-	2.7		

* Grade with * does not count toward total credits
R Course was repeated; credits count toward total

The following grades, marks, or notations also appear on transcripts:

AU Audit
CR Credit *Credit/No Credit grading mandatory in Spring 2020 due to the COVID-19 pandemic*
I Incomplete
MM Maintaining Matriculation
NC No Credit *Credit/No Credit grading mandatory in Spring 2020 due to the COVID-19 pandemic*
NG No Grade
P Pass
UW Unofficial Withdrawal
WD Withdrew

Graduating Class Prior to 1998

90–95	Outstanding	(A)	60–64	Failing	(F)
85–89	Superior	(B+)	P	Pass	
80–84	Very Good	(B)	F	Fail	
75–79	Good	(C+)	INC	Incomplete	
70–74	Passing	(C)	WD	Withdrew	
65–69	Conditional	(D)			

Accreditation Statement

St. John's University is accredited by the Middle States Commission on Higher Education, 3624 Market Street, Philadelphia, PA 19104; 267-284-5000. The Middle States Commission on Higher Education is an institutional accrediting agency recognized by the US Secretary of Education and the Council for Higher Education Accreditation. For further information, please visit www.stjohns.edu.

St. John's University School of Law is fully accredited by the American Bar Association and is a member of the Association of American Law Schools. For further information, please visit law.stjohns.edu.

Validation

A transcript is official only when it bears the signature of the Registrar and the Seal of the University. This transcript is printed on security paper and does not require a raised seal.

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Dear Sir or Madam:

My name is Ifeoma Ike, and I am honored to recommend Tatehona Kelly for employment as a Judicial Clerk. Having known Tatehona for over five years, she easily stands out as a rising advocate committed to public service and justice. I am excited to see her join our legal community, as Tatehona possesses the judgment and poise needed in our profession.

My initial interaction with Tatehona was short yet intentional. Serving as Counsel on the U.S. House Judiciary Committee, I was accustomed to junior staffers of color approaching me for advice on how to rise up in Capitol Hill, gain the recognition of a sitting congressional member, or land an influential position on a desired Committee. Not Tatehona. At a career speed mentoring event, Tatehona sat across from me, and after I asked her if she had any questions about the "Hill," she said, "no. I don't want to be here. I heard you were leaving to go to the Innocence Project. I'd like to work there one day and want to know more about public interest law." That concise and bold statement stuck with me. Upon joining the team at the Innocence Project, I reached out to Tatehona when an internship position opened. As her former supervisor, I observed Tatehona's ability to meaningful add to any environment she enters. Tatehona is a self-starter; she regularly researched legislation, advised teams on current policy considerations, and created briefs and reports to support our organization's policy and legal teams.

After her month at Innocence Project, Tatehona went on to gain valuable experiences at other reputable non-profits, including ACLU's National Prison Project. She then went on to join Teach for America and become a tenured New York City public school teacher before transitioning to law school. But of all the achievements on her impressive resume, Tatehona has already made a mark as a founding member of *Organizing for Equity NY,* a collective of thought-leaders dedicated to improving the lives of marginalized children within New York.

As a third-year law student, she held several impressive leadership positions and completed internships with the Department of Justice, Deutsche Bank, and Apple Bank. I am impressed by Tatehona's commitment to reaching her goals and her ability to balance achievement with grace. Tatehona is not only kind and patient, but she also has a voracious desire to learn. This quality is essential for a successful attorney.

Tatehona initially thought she would go straight to law school from undergrad. But similar to myself, she obtained a masters, gained more real-life experiences, and explored ways to be an advocate. I invite you to dream about the various ways Tatehona will add value to your chambers and the legal profession at large.

Warmest Regards,
Ifeoma Ike
Ifeoma Ike, Esq.
Partner, Think Rubix, LLC

Desk of Ifeoma Ike, Esq. | Ifeoma@thinkrubix.com

May 02, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

It is with great pleasure that I provide this letter of recommendation for Tatehona Kelly as she seeks employment as a Judicial Clerk. A motivated young woman, Tatehona possesses the knowledge, skills, and leadership qualities to make her an excellent addition to your chamber. Tatehona served as a Congressional Black Caucus Foundation intern in the office of Congresswoman Marcia L. Fudge in the summer of 2012. I had the privilege of being her supervisor. During her time with the Congressional office, she made a strong and lasting impression on both Members of Congress, Congressional staff, and her fellow interns.
As her former supervisor, I can attest to Tatehona's ability to contribute meaningfully. She conducted legislative research, monitored the status of bills on the House floor and in committee, and drafted floor speeches and press releases for the Congresswoman. I distinctly remember her as an applicant to the internship program; she applied as a freshman but beat out older and more experienced applicants because of her writing, poise, and general aptitude for working and connecting with others. In this vein, after Tatehona completed her internship, I became her mentor. I have watched and assisted Tatehona in furthering her career for over ten years, and it has been a pleasure.
There was a time Tatehona was thinking of going straight to law school from undergrad. Instead, she became a tenured teacher, obtaining a Master and graduating summa cum laude. As a classroom teacher, she received the Superintendent's Certificate of Recognition for Exceptional Educational Leader. As a third-year law student, she has held several leadership positions, including Director of Spring Break Pro Bono Activities for her school's Public Interest Center. She has received scholarships for her character, intelligence, and promising aptitude for the law. All while earning prestigious internships, including being an Honor Intern for the Department of Justice. She has also completed internships at one of the world's leading banks and was personally invited by the General Counsel of Apple Bank to extern under him.
I have always been impressed with Tatehona's no-nonsense attitude about reaching goals, her willingness to explore new legal concepts, and her ability to balance that drive with a pleasant demeanor and natural grace. In a world where everyone is a critic, Tatehona already possesses a skill that I believe is essential for an effective attorney: proactive problem-solving. Tatehona is a problem solver, and a judicial clerkship will further provide her with an opportunity to hone her research and writing skills, which will bolster her natural intellectual curiosity by exposing her to a wider variety of legal issues.
As the youngest of five daughters and the first in her family to go to law school, Tatehona Kelly is a hard worker above all else. Her experiences will serve her well for years to come and translate well into this your courtroom. My only hope as a recommender for Tatehona Kelly is that you see in her the potential for success that I already know she possesses. I recommend Tatehona Kelly without reservation for this clerkship.

Clifton Williams - cwilliams@taftlaw.com

February 28, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

It is my pleasure to provide this letter of recommendation for Tatehona Kelly as she seeks employment as a Judicial Clerk. Tatehona was an extern at Deutsche Bank in the legal department during the Fall 2021 semester. As her supervising attorney and mentor, I am aware of the exceptional ways in which she manages to learn even the most complex of legal assignments, often suggesting solutions that even more seasoned attorneys have not brought to the table. While in her role as an extern for the Deutsche Bank's Corporate Bank division, Tatehona was presented with complex legal issues on a weekly basis, all of which were new to her. With each assignment, she studied the material, asked the right questions and produced top-notch work product – well-reasoned and well-drafted. She impressed each member of the department that worked with her.

Beyond her work product, Tatehona is a delightful young professional, who is passionate about the law, her community, and goes an above and beyond in any task presented to her. She is courteous and patient, excellent at paying attention to the smallest of details and eager to contribute at any level.

I give my full recommendation to Tatehona, as I believe in her ability to be a great contributor to the role of a judicial clerk and I believe that she will be an asset to any organization.

Sincerely,

Jennifer Bouda

Vice President and Senior Counsel, Deutsche Bank

Jennifer Bouda - jennifer.bouda@db.com

TATEHONA KELLY
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The attached writing sample is an excerpt from an Appellee's Answering Brief in the United States Court of Appeals for the Eleventh Circuit. I have received permission from my employer to use this brief as a writing sample.

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TATEHONAK@GMAIL.COM

SUMMARY OF ARGUMENT

The district court previously dismissed without prejudice Appellant's Complaint seeking review of his Form I-485 because the Complaint was an indirect challenge to a removal order. An order of removal is governed by the exclusive jurisdiction provision of § 1252 (a)(5); thus, the district court lacked jurisdiction. *Francila v. Wolf*, No. 5:20-CV-144-OC-30PRL (M.D. Fla.), ECF No. 1 ("the First Action"). Two months later, Francila, through the same counsel, filed a second action that was nearly identical to his first, except that he added two arguments. *Francila v. Wolf*, No. 5:20-CV-547-RBD-PRL (M.D. Fla.) ("the Second Action"). The Government moved to dismiss the Second Action for lack of jurisdiction. As the First Action already determined that the district court did not have jurisdiction over Appellant's claims, a second consideration of jurisdiction is precluded by claim and issue preclusion.

Appellant, subject to a final removal order issued by an immigration judge ("IJ") in 2009, challenged the United States Citizenship and Immigration Services' ("USCIS") decision to deny his Form I-485, Application to Register Permanent Residence or Adjust Status. USCIS denied Appellant's Form I-485 because the IJ, not USCIS, has exclusive jurisdiction over Appellant's application.[1] By contesting the jurisdictional determination, Appellant impermissibly attacked the final order of removal. Accordingly, the district court lacked jurisdiction to hear Appellant's claim.

Moreover**,** even if the district court had subject matter jurisdiction over Appellant's jurisdictional challenge—which it did not—Appellant's challenge is premised on a

[1] The immigration court has exclusive jurisdiction over an adjustment application if the alien is in deportation or removal proceedings unless the alien is an "arriving alien," (with one exception not applicable to this case), in which case USCIS has exclusive jurisdiction. *See* 8 C.F.R. § 1245.2(a)(1); 8 U.S.C. § 1255(a).

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misunderstanding of controlling law and fails to state a claim on which the Court may grant relief. Appellant argues that he became an "arriving alien" when he returned to the United States after leaving the United States under a grant of advance parole. When Appellant returned to the United States, he was admitted under the same immigration status he had when he departed—an alien who entered without inspection, who had been granted TPS, and who is subject to an order of removal. Appellant did not become an arriving alien for purposes of immigration relief upon his return to the United States, and the IJ, not USCIS, retained exclusive jurisdiction over Appellant's Form I-485.

ARGUMENT

I. The district court was correct to dismiss Francila's Complaint in the Second Action based on claim preclusion.

A judgment's preclusive effect is defined by claim preclusion and issue preclusion, which are collectively referred to as "res judicata." *Taylor v. Strudel*, 553 U.S. 880, 892 (2008). While this definition is standard, it tends to lump together, under a single name, two different effects of judgment. Black Law's Dictionary 1425 (9th ed. 2009). "[C]laim preclusion" expressly "forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *Id.* In contrast, "issue preclusion" or "collateral estoppel" "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination." *Id*. In this case, Appellant's Complaint is precluded by both claim and issue preclusion. The Court may affirm on either basis.

A. Francila's Complaint in the Second Action met all four elements to be barred under the doctrine of claim preclusion.

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For claim preclusion to bar a subsequent case, four elements must be present: "(1) the prior decision was rendered by a court of competent jurisdiction; (2) the parties were identical in both suits; (3) there was a final judgment on the merits; and (4) the prior and present causes of action are the same." *Jang v. United Techs. Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000).

As for the third element, a dismissal for lack of subject-matter jurisdiction may constitute a judgment on the merits where, as here, pleading a claim and pleading jurisdiction entirely overlap. *See Brownback v. King*, 141 S. Ct. 740, 749 (2021).

As for the fourth element, the Eleventh Circuit precedent clarifies that claims are part of the same cause of action when they "arises out of the same nucleus of operative fact." *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999). In determining whether claims arise from a "common nucleus of operative fact," for claim preclusion purposes, "the issue is not what effect the present claim might have had on the earlier one, but whether the same facts are involved in both cases so that the present claim could have been effectively litigated with the prior one." *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1301 (11th Cir. 2001). Additionally, a new claim is barred by claim preclusion if it is based on a legal theory that was or could have been used in the prior action. *Ragsdale*, 193 F.3d, 1238 (11th Cir. 1999).

Appellant concedes that two of the four elements for applying claim preclusion are met: the parties are identical and the district court had jurisdiction to decide in the prior action. However, Appellant contends that the other two elements of claim preclusion—whether the earlier judgment was a final judgment on the merits and whether the cases involve the same causes of action—are not satisfied here. Appellant is wrong on both counts.

The decision in the First Action was a final judgment on the merits rendered by a court of competent jurisdiction in a lawsuit involving parties identical to those in the Second Action. As

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stated, the third element—a final judgment on the merits—is present because the dismissal for lack of subject-matter jurisdiction constituted a judgment on the merits. *King*, 141 S. Ct. at 748. A judgment is "on the merits" if the underlying decision "actually passes directly on the substance of a particular claim before the court." Id. (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp*., 531 U.S. 497, 501–02 (2001)). Appellant argues that the District Court's motion to dismiss without prejudice is not entitled to preclusive effect because it is not a final judgment. Appellant Brief 24. However, it is widely recognized that the "finality requirement is less stringent for issue preclusion." *See Chris v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000). The District Court's motion to dismiss satisfies this limited standard for finality *Id*. (explaining that when a court considers a wide range of evidence from all concerned parties and writes a substantial order in which it explains its findings that can satisfy finality). Further, the Magistrate Judge, whose opinion the district court adopted in the First Action without objection by either party, unequivocally passed on the merits. *See Francila*, No. 5:20-CV-144-OC-30PRL, ECF No. 15 at 5–7.

As to the fourth element, the cause of action is identical in the First and Second Actions—denial of his Form I-485 for lack of jurisdiction— previously dismissed in the First Action. The Government moved to dismiss the Complaint in the Second Action, arguing again that the Court lacks subject matter jurisdiction. Appellant App'x 65. Appellant's own admission—that the "facts underlying the first claim are the same" in the Second Action is fatal to its argument that the cases do not involve the same cause of action. Appellant Brief 18. The only tangential difference between the First Action and the Second is the USCIS Policy Manual Update claim. Appellant App'x 152. Appellant attempts to circumvent this problem by arguing that in the Second Action, they are raising an additional claim that the USCIS bypassed APA's "notice and comment"

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requirement when they published a new policy standard on December 20, 2019. Appellant Brief 18. Because the "notice and comment" rulemaking issue wasn't raised in the First Action, Appellant claims it cannot be precluded.

The USCIS Policy Alert is not a new standard; it is why the USCIS denied his Form I-485. The alleged "new standard" clarifies that TPS beneficiaries who had outstanding, unexecuted final removal orders at the time of departure, remain TPS beneficiaries who continue to have outstanding, unexecuted final removal orders upon lawful return. *Id.* Appellant "was not an arriving alien" before he departed from the United States, so he cannot be deemed to be an arriving alien upon his return to the United States. Appellant App'x 26. Therefore, USCIS found that because he was not an arriving alien, Appellant remained "subject to a final removal order that was neither terminated nor concluded with [his] removal or departure under such an order of removal." *Id*. Thus, "USCIS ha[d] no jurisdiction over [his] application for adjustment of status." *Id*.

The Appellant's "new policy standard" allegation is just another attempt to explain why he believes USCIS's denial was "arbitrary and capricious, an abuse of discretion, and not in accordance with the law." Appellant App'x 7-9. Regardless, he could have raised this argument in the First Action. (finding "res judicata bars the filing of claims which were raised or could have been raised in an earlier preceding, *Ragsdale,* 193 F.3d 1235, 1238 (11th Cir.1999))(*See also Davila v. Delta Air Lines, Inc*., 326 F.3d 1183, 1187 (11th Cir. 2003) (claim preclusion "pertains not only to claims that were raised in the prior action but also to claims that could have been raised previously" (citation omitted)); *Citibank, N.A. v. Data Lease Fin. Corp*., 904 F.2d 1498, 1501 (11th Cir. 1990)). Therefore, there is no basis, in other words, for this court to find that the "causes of

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action" at issue in both cases were anything other than the same. The Court should affirm the district court's dismissal of Francila's Complaint in the Second Action on this basis alone

B. Francila's Complaint in the Second Action, alternatively, was barred under the doctrine of issue preclusion

All of the elements for issue preclusion are also satisfied. The Eleventh Circuit has articulated the following standard for issue preclusion:

> To claim the benefit of collateral estoppel the party relying on the doctrine must show that: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been "a critical and necessary part" of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Christo v. Padgett, 223 F.3d 1324, 1339 (11th Cir. 2000) (citing *Pleming v. Universal–Rundle Corp.*, 142 F.3d 1354, 1359 (11th Cir.1998)).

In determining when an issue has been "actually litigated," the *Pleming* court cited the Restatement that "[w]hen an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated." *Id.* (quoting Restatement (Second) of Judgments § 27 cmt. d (1982)).

First, the issue at stake is identical to the one involved in the prior proceeding. Appellant sought again APA review of his denied Form I-485—which was already dismissed for lack of jurisdiction—and the opportunity to contest the USCIS Policy Alert that clarified that TPS beneficiaries who had outstanding, unexecuted final removal orders at the time of departure, remain TPS beneficiaries who continue to have outstanding, unexecuted final removal orders upon lawful return.

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Appellant attempts to circumvent the second and third elements by claiming that the jurisdictional issue and the USCIS Policy Alert were not litigated in the First Action and thus unnecessary or critical to the judgment. Appellant App'x 25. Appellant raised subject matter jurisdiction in the Complaint and pre-trial motions. In both actions, Francila asked the district court to find USCIS's denial to be arbitrary and capricious, an abuse of discretion, not according to the law, and compel USCIS to adjudicate his Form I-485. *See* Appellant App'x 6-17. Appellant then submitted a response objecting to the Government's motion to dismiss the Complaint for lack of subject matter jurisdiction. *See* Appellant App'x 91-111. In both the First Action, the jurisdictional issue was raised, fully litigated, and determined, thereby precluding a second consideration of the jurisdictional issue in the Second Action.

Francila contends next that even if the jurisdictional issue was raised and litigated in the First Action, it was not "critical or necessary" to the judgment. Appellant App'x 25-27. This argument is simply unfounded. Both claims were the basis for Appellant's Complaint in both the First and Second Action and the reason for USCIS's denial of Appellant's Form I-485 in the first place. *See* Appellant App'x 26.

Finally, Francila argues that he did not have a "full and fair opportunity" to present a full defense to the Magistrate Judges R& R because his counsel failed to object to it. Appellant App'x 28. However, Francila cannot now escape the doctrine of issue preclusion "by asserting its own failure to raise matters clearly within the scope of a prior proceeding." *Underwriters Nat. Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 710 (1982). Appellant was given fourteen days to respond with written objections to the R&R's factual findings and legal conclusions. Appellant App'x 21. Appellant failed to object or contest the findings because they

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missed the deadline. *Id.* Francila references no authority to support the suggestion that his non-participation in the R&R objection process under Rule 72 of the Federal Rules of Civil Procedure deprived him of a "full and fair opportunity" to brief the jurisdictional issue he raised. Appellant had a substantial chance to participate in the adversarial process and failed to exercise that opportunity.

Thus, Francila was barred from re-litigating the district court's jurisdiction in the Second Action, and the district court correctly dismissed the Complaint.

Applicant Details

First Name	**Mina**
Middle Initial	**E.**
Last Name	**Khalil**
Citizenship Status	**U. S. Citizen**
Email Address	**mikhalil@sas.upenn.edu**
Address	**Address** Street **319 W. 21 Street** City **New York** State/Territory **New York** Zip **10011** Country **United States**
Contact Phone Number	**9173920995**
Other Phone Number	**9173920995**

Applicant Education

BA/BS From	**Stanford University**
Date of BA/BS	**June 2006**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 19, 2011**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Human Rights Journal**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Pennsylvania**

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Hulsebosch, Daniel
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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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March 23, 2022

The Honorable Judge John D. Bates
U.S. District Judge for the District Court for the District of Columbia
333 Constitution Avenue N.W.
Washington D.C. 20001

Dear Judge Bates:

I am writing to apply for a clerkship in your chambers for the 2022 to 2023 term. Born in Egypt from where I immigrated to the United States at the age of eight, I hold a J.D. from Harvard Law School and a Ph.D. from the University of Pennsylvania, where I most recently completed a dissertation on the history of the criminal defendant in modern Egypt. Grounded in my education, I have a vast array of experience executing extensive legal research and writing projects under strict deadlines and conditions.

Enclosed, please find my resume, law school transcript, and writing sample. You will also receive letters of recommendation from the following law professors:

Professor Noah Feldman
Hauser 210, Harvard Law School
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Professor David Golove
Vanderbilt Hall 504, NYU School of Law
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Professor Daniel Hulsebosch
Vanderbilt Hall 503, NYU School of Law
40 Washington Square South
New York, NY 10012
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My passion for studying law and its procedures began before I entered law school, when I worked for the Egyptian Initiative for Personal Rights conducting research on human rights violations of gay men who were arrested and tortured under Mubarak's authoritarian regime. During law school, I continued to defend the rights of the accused, women, and children at the United Nations, while I strove to understand the history and theory of law and its various purposes in serving society at large. After completing my law degree, I continued to work a human rights activist and taught constitutional law in Egypt, where I later returned to complete intensive archival research for my dissertation. Most recently, as a legal fellow at both NYU School of Law and Harvard Law School, I have engaged with the moral principles of the law and its application in different cultural and historical contexts both within and outside the United States.

My scholarly and legal work has in every instance been undergirded by my being immigrant and a gay man who has overcome many obstacles to achieve my academic goals. I am today more than ever still passionate about understanding the law, its history, its theory, and its application. For these reasons, I very much look forward to contribute to the work of your chambers while learning about justice in action.

Thank you for your time and consideration.

Respectfully yours,

Mina E. Khalil

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EDUCATION

UNIVERSITY OF PENNSYLVANIA, *Doctor of Philosophy*, Arabic and Islamic Studies, August 2021
Honors: Dean's Scholar (2020); Benjamin Franklin Fellowship (2013-2018); American Research Center in Egypt (ARCE) Fellowship (2018-2019)
Coursework/ Research: Islamic law; legal, social, and intellectual history of nineteenth-century Egypt; history of equality before the law; history of the criminal defendant; legal history of the Ottoman and British Empires

HARVARD LAW SCHOOL, *Juris Doctor*, May 2011
Honors: Recipient of 2011 Islamic Legal Studies Winter Grant to study constitutional law in Egypt
Recipient of 2009 *Chayes Summer International Public Service Fellowship*
Recipient of the Pro-Bono Service Award (2011)
Coursework: Comparative constitutional law, Islamic law, constitutional law, comparative law, legal history, legal philosophy
Activities: *Harvard Human Rights Journal*: Executive Editor (2009-10); HLS Lambda, Co-Political Chair (2009-10), organized comparative international LGBT law conference (April 2010); Middle East Law Student Association (MELSA), Social Chair (2009-10)

STANFORD UNIVERSITY, *Bachelor of Arts*, Political Science and Philosophy, June 2006
Honors: Dean's Award for Academic Excellence; Awarded Thesis Research Grant to study civil society and law in Egypt

OXFORD UNIVERSITY, Magdalene College, Stanford Overseas Program, Spring 2004
Coursework: Tutorial in Democratic Jurisprudence, British Politics, British Colonial History

EXPERIENCE

HARVARD LAW SCHOOL, Cambridge, MA — August 2020 – May 2021
Visiting Fellow in the Program on Law and Society in the Muslim World
Liaised with legal experts on Islamic law and the modern Middle East; researched, analyzed, and defended arguments on the changes and their underlying causes of Islamic law, modern constitutions, and legal codes in modern Islamic societies from Egypt to Kurdistan to Sri Lanka.

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY — August 2019 – May 2020
Samuel I. Golieb Fellow in Legal History
Liaised with leading experts on American and Islamic constitutional history, including topics on the history of slavery, civil rights, women and indigenous rights, and prohibition; co-taught legal history colloquium to J.D/L.L.M students; presented original research on history of law in nineteenth-century Egypt.

UNIVERSITY OF PENNSYLVANIA, SCHOOL OF ARTS AND SCIENCES, Philadelphia, PA — August 2013 – August 2018
Teaching Assistant / Researcher
Taught courses on the history of the Islamic Middle East; advised students; developed syllabi; researched in various historical archives in Egypt and Europe.

THE AMERICAN UNIVERSITY IN CAIRO, LAW DEPARTMENT, Cairo, Egypt — August 2012 – May 2013
Visiting Assistant Professor of Islamic and Comparative Law
Taught courses in comparative constitutional law, Egyptian/Middle Eastern codes and constitutions, Islamic law, First Amendment law, and separation of powers.

HISHAM MUBARAK LAW CENTER, Cairo, Egypt — August 2011 – August 2012
Harvard Law Fellow
Investigated and analyzed legal and constitutional reforms of the Egyptian criminal justice system and Egyptian police following President Hosni Mubarak's rule with leading human rights lawyers and activists during the 2011 Arab Spring; drafted constitutional amendments and engaged grassroots organization movements

UNITED NATIONS CHILDREN'S FUND (UNICEF), New York, NY — Summer 2010
Harvard Program on Humanitarian Policy and Conflict Research (HPCR) Law Intern
Researched, analyzed, and presented recommendations on the application of international humanitarian, criminal, and human rights law to assist UN humanitarian operations;

UNITED NATIONS, WORLD HEALTH ORGANIZATION (WHO), Geneva, Switzerland — Summer 2009
Harvard Chayes Public Service Law Fellow
Authored a manuscript applying international human rights law to reform national criminal, healthcare, and employment laws that support women and adolescents' reproductive and sexual health.

EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS (EIPR), Cairo, Egypt — April 2008 – August 2008
Legal Research Fellow
Analyzed codes and constitutions in the Middle East and North Africa for sexual rights. Assisted Egyptian lawyers with impact litigation in administrative, constitutional, and criminal courts on behalf of religious and sexual minorities.

AXINN, VELTROP, & HARKRIDER LLP, New York, NY — April 2007 – April 2008
Legal Assistant at a leading antitrust/intellectual property boutique law firm
Reviewed documents, prepared presentations in pre-trial discovery in large intellectual Neosporin-Actavis case, involved in pre-trial discovery in several large mergers and acquisitions, prepared government first and second-requests, engaged in depositions, researched on Westlaw and NexisLexis antitrust legal codes and case law.

HUMAN RIGHTS WATCH, New York, NY — September 2006 – April 2007
Research Assistant in the Middle East and North Africa (MENA) Division
Interviewed victims and investigated human rights abuses in Egypt, Jordan, and Saudi Arabia. Petitioned international businesses to reform UAE labor laws. Translated official Arabic documents.

U.S. DEPARTMENT OF STATE, Washington, D.C. — Summer 2004
Intern in the Office of International Religious Freedom (DRL)
Coordinated and wrote country summaries on the status of religious freedom in the Middle East.

LANGUAGES AND INTERESTS

Native speaker of Arabic and English. Proficient in French, German, Persian, Turkish, and Spanish. Travelled throughout the Middle East, North Africa, and Europe.

ACADEMIC PUBLICATIONS

"Doctrinal Shifts on the Eve of Transformation: The Dual Process of Making Equality before the Law in Nineteenth-Century Ottoman Egypt," *Harvard Journal of Islamic Law* (forthcoming)

"Extract from an Egyptian textbook of criminal law, *al-Durra al-Yatīma fi Arkān al-Jarīma* of Muhammad Ra'fat, published in 1892 (Arabic)," *Islamic Law in Context: A Primary Source Reader*, Edited by O. Achassi and R. Gleave (Cambridge: Cambridge University Press, 2021)

"Early Modern Constitutionalism in Egypt and Iran," *UCLA Journal of Islamic and Near Eastern Law*, Issue 1, Vol. 15 (2016): 33-54.

OPINION EDITORIALS & INTERVIEWS

"Amal and Afaf: Egypt's Revolutionary Underdogs Deserve an Inclusive Constitution." *The Huffington Post*. Online. 19 July.

Al Jazeera English Television, Cairo, on Egypt's Draft Constitution (Dec. 15) 2012

Newsweek, The Daily Beast, with Vivian Salama (Jun. 26)

CONFERENCE ACTIVITY/PARTICIPATION

Papers & Lectures Presented

"The Birth of the Interrogation in Nineteenth-Century Egypt," Middle East Studies Association (MESA) Annual Conference (Oct. 28-31, 2021)

"Scrutinizing the Criminal Mind in Modern Egypt," Program on Law and Society in the Muslim World, Harvard Law School (May 20, 2021)

"From Criminal Records to Mugshots: Asserting Proof before the State in Modern Egypt, 1820-1920," History of Forensics Workshop, UC Hastings College of Law (Mar. 27-28, 2021)

"The Pasha's New Boots: Making a New Ordered Society in Nineteenth-Century Egypt," Middle East Studies Association (MESA) Annual Conference (Oct. 5-17, 2020)

"Equating the Criminal Defendant: Remaking Justice Before the Criminal Law in Modern Egypt, 1820-1920," Law and Society Association (LSA) Annual Meeting (May 28-31, 2020)

"Tracing the Criminal Defendant in Modern Egypt," Panel: "The Legal Regulation of Punishment in Comparative Perspective," American Society for Legal History (ASLH) Annual Conference (Nov. 21-24, 2019)

"Historical Justice before the Criminal Law in Modern Egypt," Lecture and Roundtable Discussion, American Research Center in Egypt (Jul. 28, 2019)

"Approaching the Criminal Mind in Modern Egypt," Graduate Student Symposium, McGill Institute of Islamic Studies, (Apr. 4-5, 2019)

"Presenting the Criminal Defendant in Nineteenth-Century Egypt: the Presumption of Innocence as Silence," "Cartographies of Silence: A Conference for Readers and Writers," University of Michigan (Mar. 15-16, 2019)

"The Birth of the Egyptian Public Prosecutor, 1820-1920," "Uses of the Past in Islamic Law," Institute of Arab and Islamic Studies, University of Exeter (Jul. 7-14, 2018)

"Magda and Nadia Haroun: Two Jewish Sisters Claiming their Egyptian Homeland," Panel: "Identity and Discourse in the Development of Nationalism," Middle East Studies Association (MESA) Annual Conference (Nov. 21-24, 2015)

"Early Modern Constitutionalism in Egypt and Iran," Summer Institute for Scholars on "Constitutions and Pluralism in Muslim States and Societies," International Institute of Islamic Thought (Jun. 8-13, 2015)

"The Social in Regulating Same-Sex Sexual Relations in Egypt," Panel: Egypt, Engaged Scholarship Conference on "Sexualities and Queer Imaginaries in the Middle East/North Africa," Middle East Studies, Brown University (Apr. 10-11, 2015)

"Reflections on Egypt's January 25th Revolution" (Bryn Mawr Film Institute, 2015)

"Security Sector Reform as a Source of Legitimation in Egypt's Democratic Transition," Institut de recherche et débat sur la gouvernance (IRG) Conference in Tunis, Tunisia (Mar. 12-14, 2012)

"The Role of the Constitution in the Transition to Democracy in Egypt," International Commission of Jurists (ICJ) Conference in Cairo, Egypt (Feb. 6-7, 2012)

"Security Sector Reform in Egypt" (Seton Hall Law School, Summer 2012)

"Religious Freedom" (AUC, Law Department, Spring 2012)

"Supreme Courts in the U.S. and Germany" (AUC, Law Department, Spring 2012)

PROFESSIONAL AFFILIATIONS/ASSOCIATIONS

Pennsylvania State Bar Association
American Society for Legal History
Law and Society Association
Middle East Studies Association
American Research Center in Egypt
Editorial Board for *Law and History Review*
Editorial Board, Shari'a Source (Harvard Law School)